CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

JULY TERM, 1871, AT JEFFERSON CITY.

WILLIAM F. SWITZLER, Plaintiff in Error, *v.* FRANCIS RODMAN, Defendant in Error.

Secretary of State — Action against, under statute — Plaintiff need not be legally qualified.—The plaintiff in an action against the Secretary of State for failure or refusal to open returns and cast up votes, if the suit be brought on his general official bond, must first show himself entitled to the office But under the statute relating to that officer (Wagn. Stat. 1272, § 15), the plaintiff may properly sue, although not lawfully elected. Within the meaning of that section he may be "aggrieved" by such failure or refusal, whether elected or not. The object of that provision is not to compensate a sufferer for the loss of office; but the liability which it imposes is in the nature of a penalty for misfeasance, of which the officer may be guilty, by reason of failure to canvass votes, although the party aggrieved received a minority of votes.

Error to Cole Circuit Court.

Glover & Shepley, for plaintiff in error.

I. The duty of the defendant was simply to cast up the votes after opening the returns, and certify the result. He had no power to look out of or beyond the returns. (Mayo v. Freeland, 10 Mo. 629; State v. Harrison, 38 Mo. 540.)

II. The house of representatives in Congress had power to say who should sit in the body, but no jurisdiction of this suit.

III. The defendant is charged with refusing to open, cast up and certify the returns. If he did so he violated the law, no matter who had the majority of the legal votes.

E. L. Edwards & Sons, for plaintiff in error.

This is not a suit on the official bond of the defendant to recover damages for the breach of the condition thereof, as in the case of Bradshaw v. Sherwood, 42 Mo. 179, but an action on the statutes regulating elections (Gen. Stat. 1865, ch. 2, p. 64, § 32), and section 15, chapter 17, p. 140, Gen. Stat. 1865, regulating the office of Secretary of State.

H. B. Johnson and *A. Budd*, for defendant in error.

I. Before a man can maintain an action for damages for being deprived of an office, he must establish in an appropriate proceeding his right to the office (Bradshaw v. Sherwood, 42 Mo. 179; Chandler v. Hunter, 45 Mo. 452); and this is so whether the action is founded on a statute or common-law principle (Bradshaw v. Sherwood, *supra*); and it makes no difference whether the breach of duty, by which it is alleged a party is injured by being deprived of an office, consists in a failure to count a return or issue a certificate, or both.

II. If actions of this character are dependent upon the question of right, and cannot be maintained until such question of right is settled, then an adjudication by the proper tribunal, adverse to such right, is a complete bar to such actions.

Bliss, Judge, delivered the opinion of the court.

At the general election in 1868, the plaintiff was candidate for Congress, from the Ninth Congressional district; the defendant was Secretary of State. In canvassing the votes the secretary refused to open the returns and count the votes for the county of Monroe, and for this refusal the plaintiff brings suit to recover the penalty provided by section 15, chapter 17, of the General Statutes (Wagn. Stat. 1272), for the refusal to perform the

duties enjoined on him by law in regard to canvassing the votes of said county of Monroe.

The defendant answered, that soon after said election the plaintiff instituted a contest in the house of representatives with Mr. Dyer, who had received the certificate of election, which contest was decided against said plaintiff; and therefore, it having been decided by the proper tribunal that he was not entitled to the seat, he was not aggrieved by the action of the defendant complained of. This answer was demurred to; the demurrer was overruled, and judgment was entered upon it.

The record shows no reason or excuse for the action of defendant, and the only question presented is whether the Secretary of State is liable under this statute to the person for whom votes have been returned, for refusing to open the returns and cast them up, when, by so doing, such person would be entitled to a certificate of election; or for refusing to grant the certificate if, upon a final contest for the office for which he had received the votes, it shall be decided that he has not been lawfully elected to such office.

The statute provides that "if the Secretary of State shall at any time neglect or refuse to perform any of the duties enjoined on him by law, * * * he shall pay to the person aggrieved a sum not less than one hundred dollars nor more than five hundred dollars, to be recovered by civil action." It is admitted by the pleadings that the secretary failed to perform a duty enjoined by law, but it is claimed, as we have seen, that the plaintiff was not "aggrieved," and for the reason named. To properly appreciate this defense, we must consider the object of the statute and the rights of those for whom votes have been returned.

This provision has nothing to do with the general personal liability of a public officer, a liability upon his bond to one who is injured by the non-performance of his duties, as by being thereby deprived of the emoluments of an office, or put to expense and trouble in vindicating his right to the same. In a case of that kind it has been held that he must first establish his right; (State, to use, etc., v. Sherwood, 42 Mo. 179; Hunter v. Chand-

ler, 45 Mo. 452), and if it appears that another person is rightfully in possession he can have no cause of action. This might well be, for the gist of the action is the wrongful deprivation, and the remedy is an action for the recovery of all he has lost by such deprivation. But the object of the statute under consideration is not to compensate the sufferer for a loss of office, but the liability it imposes is in the nature of a penalty for a misfeasance. It is true this penalty goes to the party injured, but not as compensation, for it may not be a tithe of what he has suffered, but rather as a restraint upon the officer and a satisfaction for a wrong, whether there has been an actual pecuniary loss or not.

It cannot be said that a person is not aggrieved by the refusal of the secretary to cast up the votes returned for him because he is not legally elected to the office in reference to which he has received the votes. He has a right to have all votes counted that have been cast for him, and it is a personal as well as a public wrong to refuse to count them. A denial of this right is an injury, a grievance, and the statute furnishes a redress. So far as this right is concerned it does not matter whether he is elected or not. If he is elected and has established his right to the office, he has a further remedy, as we have seen; but if not elected, his right to have the votes he has received properly canvassed, is equally clear and unequivocal, and he is "aggrieved" if they are not so canvassed.

The third count charges the defendant with refusing to give the plaintiff his certificate of election. In order to sustain that count, it must of course appear from the returns that he was entitled to the certificate. But the first and second counts, which seem to embrace but one misfeasance, charge him with refusing to open and cast up the returns; and to sustain this charge it cannot matter whether he was entitled to the certificate of election or not, although in this petition his right to the certificate is alleged.

It is not the intention of the statute to confine its benefits to those who succeed in political contests; otherwise those in a minority could have no remedy, and the secretary might with impunity wholly disregard his duties so far as they were interested in their

performance. Such is not the letter or spirit of the law. Those not elected, and not entitled to a certificate of election, have rights, and though they may not sue for the emoluments of the office, they may insist that every vote cast for them be carefully canvassed; and their rights are infringed, or, in the language of the statute, they are "aggrieved," if the votes they have received are not so canvassed.

The demurrer, therefore, should have been sustained to the answer to the first three counts, as not setting forth facts that constitute a defense to the causes of action embraced in those counts.

But the petition contains a fourth count charging that the plaintiff demanded a copy of the said returns of Monroe county, offering to pay the fees therefor, and that defendant refused to furnish it. The answer to this count denied the demand and alleged that the fees were not tendered.

As to the answer to this count, the demurrer was properly overruled, but for not sustaining it to the other counts the court committed error; and the other judges concurring, the judgment will be reversed and the cause remanded.

EUGENE LUNGSTRASS, Respondent, *v.* GERMAN INSURANCE COMPANY, Appellant.

1. *Insurance, fire, contract of — What acts essential to.* — The rule of law now is that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient.

2. *Insurance, fire, policy of — Letter of acceptance by insured not necessary to close contract, when — Remittance — Failure to remit premium — Agency.* — The agent of a fire insurance company, in response to his application therefor, received from it a policy of insurance on his goods. On the day of its receipt he made an entry in his book of accounts with the company of the amount chargeable against him for the premium. The next day the goods were burned. On his announcement of the loss, the company refused to pay on the ground that his premium had not been forwarded. *Held*—

1. That his entry of indebtedness being made on the receipt of the policy, and in a book in which his accounts with his principal were regularly kept, sufficiently closed his contract, without necessity of forwarding a letter of acceptance.

2. That inasmuch as his remittances were forwarded only at the end of each month, his failure to pay the amount of the premium before that time did not release the company from its liability.

Appeal from Pettis Circuit Court.

Finkelnburg & Rassieur, and ***Crandall & Sinnet***, for appellant.

I. The contract of insurance never was consummated. This policy could have become binding only by the dispatch of a notification of acceptance directed to the insurer, by mail or otherwise, before the fire. (Phill. Ins., § 17; Taylor v. Merch. Fire Ins. Co., 9 How. 390; Wallingford v. Home Mutual Fire Ins. Co., 30 Mo. 46; Neville v. Merch. & Manuf. Ins. Co., 19 Ohio, 459.) Assent must be signified to the other contracting party, and where the parties are at a distance such signification is by letter, dispatch, or other missive, put under way to the other party. (2 Dutcher, 280; 46 Mo. 366.) In this case there was no union of minds, and the defendant could not have held plaintiff for the premium. (Ocean Ins. Co. v. Carrington, 3 Conn. 357.) Where premiums cannot be enforced in law, the contract is not binding on the insurance company. (Neville v. Merch. & Manuf. Ins. Co., *supra.*)

II. Plaintiff cannot shield himself behind his agency. Having conducted the whole matter of negotiation from its inception with defendant directly by correspondence, he cannot now seek to bind defendant by any pretended private memorandum made in a memorandum book of his own, of which no notice was sent to defendant — of which defendant knew nothing, could know nothing, and which remained under plaintiff's control, to be made or unmade as he pleased. Indeed, he could not in law have acted as agent of both parties under any circumstances. Such contracts are void. "An agent of an insurance company, however broadly his authority may be expressed, has no power to act for

himself. He cannot make a contract in which he acts directly for himself, and also as agent for the company." (Bentley v. Columbia Ins. Co., 19 Barb. 595; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. 133.)

Phillips & Vest, for respondent.

The company, by the terms of its letter, charged plaintiff with a premium of $99.35. Could it thus hold itself in the double vantage-ground of claiming this premium if there had been no fire on the 7th of November, 1867, and then not be liable to him in the event of a fire?

Furthermore, when plaintiff received the altered policy, and charged himself with the premium of two per cent., he had not received the letter purporting to have been written on the 4th of November, 1867; and of course the entries made by him on the 6th of November, prior to the fire, were pursuant to this letter, and in the usual course of business. The court properly declared the law in the instructions given for the respondent. (42 Mo. 38, 41; 5 Ind. 96; Chase v. Ham. Mut. Ins. Co. of Salem, 22 Barb., S. C., 527; Taylor v. Mer. Fire Ins. Co., 9 How. 390.)

Defendant claims that plaintiff should have notified the company before the fire of his acceptance of the policy at two per cent. This theory of the appellant wholly ignores the well-settled principle that during a negotiation of this character, whenever the *aggregatio mentium* takes place, the contract of insurance is complete. (Ang. Fire and Life Ins. 69, § 34; Keim *et al.* v. Home Mut. Ins. Co., 42 Mo. 41.)

When the company first sent up the policy on the 28th October, they did not contemplate that the assured should notify them of his acceptance, for they informed him in their letter that they had charged him with the premium, and directed him to sign the policy as agent. He never notified the company of the acceptance of the other two policies, and yet they received the premiums November 13th, and considered the parties insured from the 26th of October. (Ang. Fire and Life Ins. 83, § 47.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff holds a policy of insurance issued under the following circumstances: He had been appointed agent of defendant for Sedalia, and on the 28th of October, in response to applications obtained and forwarded by him, the secretary sent him policies numbered 294, 295 and 296, the first being a policy upon his own goods. The premium charged was two and a-half per cent., and, being dissatisfied with the rate, the plaintiff sent back his own policy for a reduction. It was reduced to two per cent. and returned, and the plaintiff claims that he received it on the 6th of November, and that on the same day he made an entry in his account with the company, recognizing the change of rate and accepting the policy as changed. Early in the morning of the 7th the plaintiff's goods were burned, and on the 8th he telegraphed the fact, claiming the benefit of the policy. The company, by its secretary, at once repudiated it, upon the alleged ground that the premium had not been remitted, but now claim it to have been invalid because no notice of its acceptance was sent to the company.

Counsel for appellant contend that this case comes under the rules governing contracts by correspondence, and that the contract was not consummated.

It is true that no contract can arise from a proposition or offer on one side until it is accepted on the other; until then it remains merely a proposition. And it is also true that this acceptance must be evidenced by some act that binds the party accepting. A man's mental resolution, that can be changed, is not sufficient; both parties must be bound or neither will be. The usual mode of accepting a proposition made by correspondence is by notice of acceptance, and though it was formerly held that it did not ripen into a contract until receipt of the notice, yet the doctrine now is that the contract is complete when the acceptance is forwarded, without reference to the time of its reception. (Kentucky M. Ins. Co. v. Jenks, 5 Ind. 96; Halleck v. Com. Ins. Co., 21 Dutcher, 280; Taylor v. M. F. Ins. Co., 9 How. 390.) But notice is not the only evidence of acceptance.

Any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties — the bringing their minds together — as a formal letter of acceptance. The terms, "the nature of the offer, or circumstances under which it is made," or relation of the parties, may indicate another mode; and if so, its adoption equally binds them.

The plaintiff, as agent, was to make his returns monthly, and when the fire occurred the time for making his current monthly return had not arrived. The secretary, on his appointment as agent, had given him a book, being "the tariff of rates and general instruction book for the exclusive use of agents," of a Cincinnati company, saying to him that the company had adopted their rules until some could be printed in its own name. Among them was the following:

"21. Insurance of your own property. If you have property of your own which you desire to have insured, * * * please forward us your application fully made out and signed, and if the risk is such as we can take, will make you a policy at this office at a fair rate, and mail it to you promptly. * * You will enter the risk on your abstract and take credit in your next account current for commission on the premium, as if the policy had been issued by yourself."

There may be some ambiguity in this instruction, but both parties seemed to understand it to mean that, as to all things but the acceptance of the risk, fixing the rate and issuing the policy, the transaction was to be the same as with an outsider through the agent, *i. e.* as the agent delivers the policy, receives the premiums, and credits the company with them, to be remitted at his next return, so he credits the company with his own premium, to be remitted in like manner. The following letter, in reply to the applications forwarded by him, including his own, No. 294, also shows this understanding:

"Enclosed transmit to you

Pol. 294	$51 25	$42 75
" 295	87 25	80 85
" 296	31 25	25 75

For which you are charged with $99 35"

Here no notice of acceptance and no remittance was required, but plaintiff was charged with the premiums less the commissions, including his own. Had the plaintiff been satisfied with the rate charged him, would any other notice of the acceptance of the policy have been thought of than the entry of the charges to the credit of the company, which was at once made? But he was dissatisfied with his own, and sent it back for abatement. It was returned reduced to two per cent., and, as the plaintiff testifies, received on the 6th of November, and the difference charged back to the company. After the fire, and in response to its announcement, the secretary sends the following telegram: "Policy 294 is not in force, as the premium was not paid; see our letter of November 4th." No objection is made because notice of acceptance had not been sent, but only because the premium was not remitted; and the letter of November 4th, to be hereafter considered, makes the payment of all the premiums at the company's office, as well as that of No. 294, a condition precedent to the taking effect of the policies; and so far as notice is concerned, aside from such remittance, it negatives the idea that it was expected; and indeed the whole record shows that notice of the acceptance of the policy was not contemplated at the time, and was only thought of after this controversy arose.

I assume that, previous to the letter of November 4th, it was the understanding that remittances were to be made monthly, for so plaintiff and the secretary testify; and I assume, what seems to have been the clear understanding, that the premiums on the plaintiff's policy were to be credited and remitted like the others. The inquiry then arises whether anything was done by the plaintiff after the second receipt of the policy, and before the fire, that amounted to an acceptance of its terms and bound him to pay the premium. He exhibits his account with the company, and testifies that every entry was made at its date. We find under date of October 28th a credit of each of the premiums as in the statement forwarded, and under date of November 6th, the day before the fire, an entry of a charge to the company of the difference between the original premium and as reduced to two per cent. This act unequivocally shows that he intended to abide by the policy as

last received, and he became thereby bound by its terms; and had there been no fire, nothing further was to be done until the time for remittance at the end of the current month.

I have alluded to the letter of November 4th, which contains the following postscript: "We call to your attention that policies go into effect only when premiums are paid here." There is a conflict of testimony in regard to the time of its receipt, the plaintiff testifying that it did not come to hand until the 8th, while the company's secretary says that it was mailed at its date, in which case it should have been received on the 5th — an important variance; but we cannot pass upon these questions of fact, and will only consider whether the instructions to the jury conform to our view of the law.

Most of those asked by defendant assume that the policy could not go into effect without express notice of its acceptance, when other acts could as well signify acceptance and bind the parties. They were therefore properly rejected.

Instruction No. 3, given on behalf of plaintiff, predicates the validity of the policy upon its having been assented to before the fire, and neither notice nor any other appropriate act signifying assent and binding the insured is required. This instruction was at least defective, and we cannot say that it did not mislead the jury. Express notice of acceptance can only be dispensed with when apparently not contemplated, and some other act of acceptance is equally clear and unequivocal. The record shows conflicting evidence in regard to facts bearing upon this question, and for this instruction I think a new trial should be granted.

Reversed and remanded. The other judges concur.

LEMUEL S. KINGSBERRY *et al.*, EXECUTORS OF JEREMIAH KINGSBERRY, DECEASED, Plaintiffs in Error, *v.* PETTIS COUNTY, Defendant in Error.

1. *Warrants, Pettis county — Made payable out of road and canal fund — Holder must look to that fund only.* — The holder of a Pettis county warrant, made payable on its face out of "the road and canal fund" of the

county, can look only to that fund for the payment of his claim, and cannot compel the county to pay the warrant out of its own proper funds.

And the liability of the county is not altered even though the road and canal fund may have been diverted from its proper purpose by legislative enactment or the action of the county, where it does not also appear that the county had actually received, or held subject to its control, some portion of that fund which it had not faithfully applied to the payment of the warrant.

The enabling act of March 21, 1868 (Sess. Acts 1868, p. 42), does not relieve the holder of the warrant.

Error to Pettis Circuit Court.

J. Montgomery, with *F. P. Wright*, for plaintiffs in error.

By her contract the county has pledged a fund for the payment of this warrant, and cannot be allowed now to say that by the terms of her contract she was to pay the debt only so long as the fund was designated as the "road and canal fund."

She cannot receive and enjoy this fund for other purposes, and at the same time use and receive the benefit of this work and labor performed under the contract, released from any and all liability therefor. (Trustees W. & E. Canal Co. v. Beers, 2 Black, S. C., 448.)

The act approved March 21, 1868 (Sess. Acts 1868, p. 42), clearly empowers the County Courts to issue bonds and levy taxes for the very purpose of paying indebtedness of this nature.

After the conversion of this fund, the county is liable, out of her own funds, for the debt. The provision that the warrant is payable out of the road and canal fund, does not preclude us from inquiring whether this provision of the warrant purports to create a debt or liability against the county. Here is an act, sanctioned by legislative approval, pledging a fund for the payment of internal improvements. The County Courts, as authorized by this act, contract with parties to make improvements, on the faith of this fund. The parties enter upon the work; the improvements are finished, accepted and enjoyed, when the Legislature, by a single enactment, destroys the very fund set apart for the purpose of paying for the improvements. This the courts will not permit. (Newell v. The People, 3 Seld., N. Y., 9.)

B. G. Wilkerson, for defendant in error.

The Circuit Court did not err in sustaining the demurrer to plaintiffs' petition and rendering judgment for the defendant; since Pettis county is not liable to pay said warrant or any part of it out of her own proper fund. (Pettis County v. Kingsberry, 17 Mo. 479.) The only difference between that suit and this is, that since that case was determined the Legislature, in pursuance of the constitution of 1865, has diverted the road and canal fund from that purpose and made it a part of the school fund. This diversion of the road and canal fund cannot possibly make said county liable on a contract on which she was not before liable, and which she never made.

CURRIER, Judge, delivered the opinion of the court.

This is a suit upon a county warrant made payable out of the "road and canal fund" of Pettis county. The same warrant was sued upon in Kingsberry v. Pettis County, and the decision in that case must control our action in this. (See 17 Mo. 479.) It was decided by this court in that case that the county could not be compelled to pay the warrant in question out of any other than the road and canal fund, and that the creditor could alone look to that fund for the payment of his claim. The object of the present suit is to get a judgment against the county, payable from its resources other than the road and canal fund, and so, in effect, to reverse the former adjudication. But that adjudication definitely settled the law which must determine the disposition to be made of the present suit, and the decision will not be departed from on the present occasion.

It is averred, indeed, in the present petition that the road and canal fund is no longer "available for the payment of the balance due on said warrant, the same having been diverted"—as the petition alleges—"from that purpose by legislative enactment, and the action of the defendant by its agents." For that reason the plaintiffs now seek to compel the county to do what this court has once decided could not lawfully be required of it, namely, to pay the warrant by an application of its general funds to that

use. The fact alleged, and as alleged, is not sufficient to take the case out of the scope of the former decision.

Had the petition shown that the county had in fact received any portion of the road and canal fund, and applied it to other uses than the payment of the warrant, or withheld it from that application, the case would have presented a very different aspect. But the petition fails to show that the county has at any time received, or held subject to its control, any part of said fund which it has not faithfully applied to the payment of the plaintiffs' warrant. The pleader contented himself by averring a general diversion, without any statement showing the amount claimed to have been diverted, whether substantial or merely nominal, or the time, place, or circumstances of the act complained of; or any fact showing that the county has in fact converted to its own use any part of the fund set apart for the payment of the claim sued on.

The enabling act of March 21, 1868 (Sess. Acts 1868, p. 42), authorizing counties in certain cases to issue bonds, does not relieve the plaintiffs' case from its embarrassments.

The other judges concurring, the judgment will be affirmed.

STATE OF MISSOURI, TO USE OF CHRISTOPHER DEMUTH, Plaintiff in Error, *v.* THOMAS WILLIAMS *et al.*, Defendants in Error.

1. *Practice, civil — Answer — New matter — Allegations, sufficiency of — Replication.*—In a suit on an attachment bond the petition averred generally that plaintiff in the attachment had failed to prosecute his action without delay and with effect; and further, that a judgment had been rendered for defendant in the transaction on a plea in abatement.

   Held, that an allegation in the answer that the attachment suit was still pending on a motion for new trial, and undisposed of, set up no new matter requiring a replication.

   In general, any fact which plaintiff is bound to prove in the first instance to sustain his action, is not new matter. In the case supposed, plaintiff, in order to show that defendant had failed to prosecute his action without delay and with effect, was bound to prove that the attachment suit had been finally disposed of.

2. *Practice, civil — Answer setting up new matter should confess and avoid.*— An answer setting up new matter by way of defense should confess and avoid.

Error to Pettis Circuit Court.

Crandall & Sinnet, for plaintiff in error.

I. A denial of any fact which the plaintiff must prove in order to recover is not new matter. (Stoddard v. Onondaga, 12 Barb. 573; Vassuer v. Livingston, 3 Kern. 248; Wells v. Pike, 31 Mo. 590; Carpenter v. Meyers, 32 Mo. 213; Holtzbauer v. Hiene *et al.*, 37 Mo. 443.)

II. A writ of error or appeal will not lie from a judgment on a plea in abatement, and the motion for new trial was improperly filed. (Davis *et al.* v. Perry *et el.*, 46 Mo. 449.)

III. The bond here sued on was conditioned that the plaintiff in the attachment suit should prosecute his action without delay and with effect, and plaintiff's right of action accrued the moment the plea in abatement was decided in his favor and the attachment dismissed, without regard to the subsequent proceeding on the merits of the case. (Wagn. Stat. 182, § 7; *id.* 183, § 11; *id.* 189, § 42; Drake on Attach., § 170; Hayden v. Semple, 10 Mo. 215.)

Snoddy & Bridges, for defendants in error.

I. The court did right in excluding all evidence tending to controvert the new matter set up by defendant's answer. The same not having been controverted stood admitted by the pleadings. (2 Wagn. Stat. 1019, § 36; Butcher v. Death, 15 Mo. 271; Steil v. Ackli, *id.* 289; Roberts v. Munson, 20 Mo. 65.)

II. No cause of action accrued until the questions raised by the motion for a new trial and in arrest of judgment were disposed of, and so long as said motions were pending there was no final disposition of the plea in abatement. (Riddlesbarger v. McDaniel *et al.*, 38 Mo. 138; Gray v. Parker *et al.*, *id.* 160.)

III. Upon the motion of defendants for judgment in the pleadings, the court was bound to give the same. (Smith v. City of St. Joseph, 45 Mo. 449.)

CURRIER, Judge, delivered the opinion of the court.

This suit is founded upon an attachment bond. The petition sets out its condition, which was in the usual form, and alleges as a breach of it that the plaintiff in the attachment failed to prosecute the same without delay and with effect, in breach of the condition of said bond. It was, moreover, averred that the attachment was abated by the judgment of the court, upon the trial of the issues raised by an appropriate plea in abatement.

The answer admits the execution of the bond, but denies the alleged breach of it; admits also the judgment of the court abating the attachment, but alleges that such judgment was not final; that in due time motions in arrest and for a new trial were filed, and that such motions were still pending and undisposed of in the court where the judgment abating the attachment was rendered.

The plaintiff made no reply, and the parties went to trial upon the issues raised by the petition and answer; and upon the trial the court ruled upon the evidence, and gave and refused instructions upon the theory that the affirmative allegations of the answer introduced new matter constituting a defense to the action, and that the facts so averred, in the absence of a replication contesting them, stood admitted by the pleadings.

The question presented for consideration, therefore, is whether the affirmative allegations of the answer—to-wit, that the attachment suit was still pending and undisposed of—presented new matter constituting a defense to the plaintiff's action, which required a replication in order to put such new matter in issue. The general rule on this subject is that any fact which avoids the action, and which the plaintiff was not bound to prove in the first instance in support of it, is new matter. (Stoddard v. Methodist Church, 12 Barb. 573.) But a fact which merely negatives the averments of the petition is not new matter, and need not be replied to. Moreover, an answer setting up new matter, by way of defense, should confess and avoid the plaintiff's cause of action. (Bauer v. Wagner, 39 Mo. 385; and see Northrup v. Miss. Val. Ins. Co., 47 Mo. 435.)

An application of these views to the answer in this cause will show that it fails to set out new matter constituting a defense. That which is claimed to be new matter merely contradicts the averments of the petition in an indirect way. The petition avers that the plaintiff in the attachment suit had failed to prosecute that suit without delay and with effect—that is, to final judgment in his favor. In order to sustain the suit, therefore, it was necessary for the plaintiff to show that the attachment suit had been finally disposed of adversely to the plaintiff in that suit. The defendant, in effect, avers that the suit is not finally disposed of, but that the same is still pending, awaiting the judgment of the court upon a motion for a new trial. That is no confession and avoidance of the plaintiff's cause of action. It is an allegation to the effect that no cause of action ever accrued upon the bond sued upon. It is, for substance, a denial of the allegation of the petition that the plaintiff in the attachment suit had failed to prosecute that suit with effect and without delay. There was, therefore, nothing in the answer requiring a reply.

The other judges concurring, the judgment will be reversed and the cause remanded.

STATE *ex rel.* JAMES H. VAIL, Relator, *v.* DANIEL M. DRAPER, AUDITOR, Respondent.

1. *Mandamus — Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.
2. *Officer in by right cannot be ousted by action of governor — Party claiming must resort to quo warranto — Payment, how made by State auditor in case of contest.*—After an officer has received his commission, has been inducted into office, and is in by color of title, he cannot be ousted by the action of the governor, as by the appointment of another in his place. The party claiming the office in such case must resort to *quo warranto*. In making payments under such circumstances, the State auditor is bound to take notice that the incumbent is an officer *de facto*, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.

State ex rel. Vail, relator, v. Draper, Auditor.

Petition for Mandamus.

Ira E. Leonard, with *Reynolds & Relfe*, for relator.

Relator is in under color of title at least—that is, under the commission issued by Governor McClurg to him, on the 20th day of April, 1869. Even though the commission may have been wrongfully issued to Vail, and Vail may not have been elected, the commission for that reason is not void; he was and is *de facto* judge (St. Louis County Court v. Sparks, 10 Mo. 118), and could only be ousted by the means and in the manner designated by law.

(Counsel here reviewed and commented upon the cases of State *ex rel.* Jackson v. Auditor, 34 Mo. 375; Winston v. Auditor, 35 Mo. 146; and State *ex rel.* Jackson v. Auditor, 36 Mo. 70, to show that they did not avail respondent.)

The auditor could not recognize Dinning as an officer without at least a *prima facie* case showing that the latter was properly in office. No such a case was presented.

If respondent has the superior title to the office, let him oust the relator by due process of law, and he is then amply assisted by the courts in recovering back any moneys wrongfully taken by the relator.

A. J. Baker, Attorney-General, for respondent, relied on State *ex rel.* Jackson v. Mosely, 34 Mo. 71; State *ex rel.* Jackson v. Thompson, 37 Mo. 375.

WAGNER, Judge, delivered the opinion of the court.

The relator asks this court to grant a peremptory *mandamus* to compel the State auditor to issue a warrant in his favor for salary as judge of the Fifteenth Judicial Circuit, for the fiscal quarter ending on the 30th of June, 1871. The action of the auditor in refusing to draw the warrant is based on the fact that the official register in the office of the Secretary of State shows that on the 14th of April, 1871, the governor of this State commissioned Louis F. Dinning to be judge of the said circuit.

The record in the case, as made up by the pleadings, shows

that both Vail and Dinning trace their title to office under and through the general election held in 1868. At that election they were both candidates for the judgeship in the Fifteenth Judicial Circuit. The register of civil officers kept in the office of the Secretary of State shows that on the 20th day of April, 1869, Governor McClurg commissioned James H. Vail (the relator) judge of the Fifteenth Circuit, "it appearing to him that he was duly elected on the 3d day of November, 1868." Under this commission Vail qualified and proceeded to discharge the duties and functions of the office, receiving the salary and emoluments thereof, and has ever since performed the duties of the same.

On the 14th of April, 1871, about two years after the first commission issued to Vail, Governor Brown commissioned Louis F. Dinning judge of the same circuit, "it having been certified by the Hon. Francis Rodman, Secretary of State, that he was duly elected November 3d, 1868." It thus appears that there is a contest in the Fifteenth Circuit as to who is the rightful judge thereof. With that contest we have nothing to do in this proceeding, as the right to an office cannot be determined upon an application for a *mandamus* directed to the auditor for a warrant for a salary. (State *ex rel.* Jackson v. Mosely, 34 Mo. 375; 36 Mo. 70; Winston v. Mosely, 35 Mo. 146.)

No parties are here contesting, and the only question for us to decide is, who is entitled to the salary as the case is now presented? Which of the parties was originally entitled to the commission we do not know, nor are we at liberty to give an opinion. When Governor McClurg, acting upon evidence which he doubtless deemed satisfactory, of Vail's election, issued a commission to him, the executive function, so far as commissioning a judge for that circuit was concerned, was exhausted. The commission invested Vail with the title, and was *prima facie* evidence of his right to the office. It gave him the possession, and he could only be deprived of it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient till some other person legally established a better and a higher right.

After the governor had issued his commission, and Vail had

qualified and been inducted into office, it was incompetent for any subsequent governor, upon any evidence whatever, to attempt to nullify or revoke that commission and devolve the office upon another. It is true that Governor Brown acted upon the certificate of Mr. Rodman, the former Secretary of State, and the evidence of Dinning's right was doubtless to him considered conclusive; still, after his predecessor had acted in the course of his official duties upon the same subject, we do not think that by any executive action Vail could be ousted or deprived of his *prima facie* right to the office. Such a proceeding would be the exercise of judicial rather than of executive powers. If an error was committed in the issuance of the commission to Vail, and Dinning was the party justly and fairly entitled to the office, the courts furnished the proper and appropriate mode for seeking redress. He should have proceeded at once by *quo warranto* and settled his claims. This remedy the law points out. To sanction any other course would lead to anarchy and disorder, and we should have the spectacle of two judges holding rival courts, each claiming obedience and authority, and both deriving their power from identically the same source. Such a state of things ought not to exist. There can be but one lawful judge, and the law has made ample provision to ascertain and determine who he shall be.

In the case of St. Louis County Court v. Sparks, 10 Mo. 117, it appears that Sparks was appointed collector of the revenue, and after the expiration of his term, Wise was appointed his successor. Wise qualified and entered upon the transaction of his official duties. Sparks was directed to make a settlement with the court, and deliver possession of the office to Wise. This he refused to do, alleging that Wise was ineligible. The marshal, by order of the court, forcibly ejected him. On this state of facts he applied to the Circuit Court for a *mandamus* to compel the County Court to restore him to the office of collector. The only ground on which Sparks claimed the office was that he held till his successor was appointed, and that the appointment of Wise was invalid, he being at the time disqualified.

Judge Scott, in writing the opinion of the court, says: "It has been long held that a *mandamus* may be issued to restore a

person to an office to which he is entitled. (4 Bacon, 500.) But we are not prepared to say that this was a proper case for the interference of the Circuit Court by *mandamus*. Various considerations incline us to this opinion. The office was already filled by one who was *de facto* an officer at least; and it appears to be the law that when an office is already filled by a person who is in by color of right, a *mandamus* is never issued to admit another person, the proper remedy being an information in the nature of a *quo warranto*. (The People v. The Corporation of New York, Johns. Cas. 79; Ang. & Ames on Corp. 565; King v. Mayor of Colchester, 2 Durn & East, 259.) It would not be just that Wise's right to the office should be determined on a proceeding to which he was no party. He was the proper person to vindicate his own rights, and a *quo warranto* was the proper mode under the circumstances to try the validity of his appointment."

Now, it is certain that Vail was a *de facto* officer, that he was in by color of right at least, and when the commission was issued to Dinning, Vail was no party to it, and had no opportunity to be heard. We may repeat the language of Judge Scott, and say it would not be just that Vail's right to the office should be determined on a proceeding to which he was no party. He was the proper person to vindicate his own rights, and a *quo warranto* was the proper mode under the circumstances to try the validity of his election and commission.

The auditor was bound to take notice that there was no claim set up to the office by either Vail or Dinning other than was derived under the election of 1868; that Governor McClurg commissioned Vail as having been legally elected at that time, and that Vail qualified, performed the duties of the office, and drew his salary therefor; in other words, that he was *de facto* the judge, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.

This opinion is strictly limited to the case now made, and can have no bearing on any question as to a contest between the parties when their rights are presented for adjudication.

In my opinion a peremptory writ should issue. The other judges concur.

A. J. REDWAY *et al.*, Respondents, *v.* A. L. CHAPMAN *et al.*, Appellants.

1. *Practice, Supreme Court — Failure to make out appeal — Neglect of clerk.* — When it appears from the records that appellant has failed to prosecute his appeal within the time required by law, the judgment will, on motion, be affirmed, even though it further appear that the transcript was ordered in time, but that the clerk neglected to make it out. The respondent must not be made to suffer by reason of his failure.

Appeal from Kansas City Court of Common Pleas.

E. L. Edwards & Sons, for respondents.

WAGNER, Judge, delivered the opinion of the court.

It appears from the record in this case that judgment was rendered in the court below on the 7th day of June, 1870, and that the appellants have failed to prosecute their appeal.

The respondent presents to this court a perfect transcript, and asks for an affirmance, with ten per cent. damages.

An affidavit is filed on the opposite side from the clerk of the court, stating that owing to a press of business he was unable to make out the record in time for the sitting of the appellate court; and another affidavit is also filed stating that the transcript was ordered in time, but the clerk neglected to make it out. These affidavits furnish no reason why the motion should not be sustained. It was the duty of the clerk to employ all the clerical force that was needed to adequately discharge the duties of his office, and if he failed or neglected to do so the respondent must not be made to suffer thereby.

It was also the duty of the appellants to see that their transcript was filed within the time prescribed by law.

The judgment will be affirmed, but without damages. The other judges concur.

PAUL THORNTON, Plaintiff in Error, *v.* WILLIAM W. MISKIMMON, Defendant in Error.

1. *Conveyances — Sheriff's deed — Amended deed should be made, when — Effect of amendment on former deed — Innocent purchasers, who are.* — It is the right and duty of a sheriff to amend a defective deed when the facts will warrant him in so doing, and the amended deed will relate back to the date of the original one.

In such case the former deed may be first set aside on motion. But the last and correct deed is not void because the imperfect deed was not first set aside.

A purchaser of the land between the date of the first and second deeds will be affected by the latter only where he had either actual notice of the facts therein recited, or notice of such recorded proceedings as would advise him of them.

Where A. purchased at sheriff's sale and went into open, notorious possession of the premises, of which fact B. was aware, but, learning that the title was defective by reason of infirmities in the sheriff's deed, proceeded to bid off the property under another judgment for a nominal sum, to say that B., in such a case, was a stranger, and should be protected as an innocent purchaser from the operation of a second and amended sheriff's deed to A., would confound all ideas as to what constitutes innocence either in an actual or moral sense.

Error to First District Court.

Jno. F. Philips and *Russel Hicks*, for plaintiff in error.

I. The Circuit Court erred in permitting defendant to read in evidence the second deed from the sheriff. This deed is subsequent in date to the institution of this suit. As between the defendant in the execution and the purchaser, a sheriff's deed acquired even after issue joined may be used by defendant under certain circumstances without being pleaded *puis darrien continuance*. (3 Cow. 75.) But this rule is ever applied under the limitation that it must not affect the rights of strangers or third parties. (3 Cow. 79; 12 Mo. 147; 9 Mo. 525; 9 Pick. 167, 169–70; 8 Mass. 240; Laws of N. C. 380 *et seq.*; 4 Johns. 234; 13 Mo. 497.)

II. The equity doctrine of notice does not properly arise in this case.

(*a*) Sheriffs' sales are within the statute of frauds, and until a deed is made the title remains in the debtor. The existence of

a judgment is not notice of a sale under it to a subsequent purchaser. (9 Mo. 527.)

(*b*) Granting the application of the doctrine of notice to this case, the evidence adduced below not only failed to fix notice on the plaintiff, but it absolutely and indisputably disproved its existence. So it must follow that if the verdict is attempted to be sustained on the ground that the circuit judge found that plaintiff had notice, it is a verdict without the shadow of evidence to support it.

(*c*) Possession is not actual notice. It serves merely to put the purchaser on inquiry as to the nature of the *terre* tenant's possession, and is evidence only of such facts as the legitimate and reasonable pursuit of this inquiry would probably lead to. (21 Mo. 321–23; 25 Mo. 318.) Had plaintiff gone to defendant, the most that can be inferred is that the defendant would have advised him that he held under sheriff's deed. This would have led to an examination of the deed. It passed no title. The amended returns and the second deed of the ex-sheriff were not then in existence, and it does not appear that at that time the defendant himself knew of the facts interpolated into the record afterward by the ex-sheriff.

(*d*) And when the possession of a party is consistent with his title as set out of record, he will not be permitted to rely on it as notice of another title, to the injury of a subsequent purchaser who has bought on the faith of the recorded title. (6 Serg. & R. 184–5; 15 N. H. 414–15.)

F. P. Wright, for defendant in error.

I. Plaintiff's objection to the reading of the deed, even if there had been any force in it, was cured by defendant's proving conclusively that he took possession of the property and moved on it a whole year before the judgment under which plaintiff claims was rendered, all of which was known to plaintiff.

II. It is submitted whether defendant's first deed, made as it was upon a sale under legal judgments, does not vest in defendant the legal title. The irregularities in this first deed could not be attached in this collateral proceeding.

III. The validity of a sheriff's deed does not depend on his return, and when one buys at a sheriff's sale, pays his money and receives a sheriff's deed, it is a matter of no consequence whether the return of the execution be imperfect or not made at all; the validity of his title cannot be affected by the irregularity or omission. (Brooks v. Roony, 11 Ga. 423; Doe *ex dem.* Wolf v. Heath *et al.*, 7 Blackf. 154; 1 Johns. Cas. 155, note *a*; 3 Yerg. 179; Hill v. Kendall, 25 Verm. 528; Gates v. Gaines, 10 Verm. 346; 5 Verm. 602; Stewart v. Croes, 5 Gilm. 442; Draper *et al.* v. Bryan *et al.*, 17 Mo. 83.)

IV. It is well settled in this State that courts will permit the sheriff to amend his return of the writ or process so as to correspond with the facts of the case, and it may be made at any time. (Webster *et al.* v. Blount *et al.*, 39 Mo. 500.)

V. The sheriff had the legal right, and indeed it was his duty, to make a new deed upon the discovery of the irregularities in the first deed. (Wagn. Stat. 612, § 54.) The fact that he has made one deed with improper recitals will not prevent him from making another reciting correctly and giving the proper evidence. (Crowley v. Wallace, 12 Mo. 143.)

VI. Although an execution issued on a void judgment is void, yet the validity of an execution issued on a valid judgment will not be inquired into in a collateral proceeding. (3 Bac. Abr. 663; Stewart v. Stockton, 13 Serg. & R. 199; 1 Wall. 135.) But even if their validity could be inquired into, both judgments of the court and the executions thereon, which are in accordance with such judgments, are valid.

Bliss, Judge, delivered the opinion of the court.

In 1865 the defendant purchased at sheriff's sale certain real estate in the town of Clinton, upon four executions against one John G. Thornton. He paid a full consideration, took possession, and made improvements; but the sheriff's deed defectively described the judgments and executions, and the returns were imperfect. In August, 1867, an execution was issued upon another judgment against said John G. Thornton, and in October following the same property was bid in by the plaintiff for a nominal

consideration; and this suit is brought to recover possession. Pending the suit, the sheriff was permitted to amend his return and make a new deed, which was set out in an amended answer as the foundation of defendant's title; the new deed was admitted in evidence, and defendant recovered judgment. The points necessary to be considered go to the admissibility of this deed, and to its effect upon the rights of the plaintiff; for, as the record is made up, we need not consider the sufficiency of the first deed, with its defective recitals, to pass the title.

First, when a sheriff discovers errors in his return, it is his duty, upon leave, to amend it so as to conform to the facts (Alexander, etc., v. Merry, 9 Mo. 514; Crowley v. Wallace, 12 Mo. 143); and if he has not executed a proper deed, he should make another, which will ordinarily relate back to the sale. When the first deed is defective, I infer the right to make an amended one, from the duty of the sheriff to correct an imperfect or false return, and especially from his duty to make a perfect deed when the facts will warrant him in so doing. The latter, it is true, is seldom necessary; for if there be a valid judgment, execution and sale, the deed must be very defective not to operate as a transfer of title. If a new deed is to be made, a motion to set aside the former one would be regular (Bay v. Gilliland, 1 Cow. 220); for it would seem that when a statutory power is once exercised, the record shows on the part of the officer a full performance of his duty, and there is apparently nothing further for him to do. (Jackson v. Stryker, 1 Johns. Cas. 284.) Its improper exercise will not, however, excuse him from such performance; and although it would be proper for the court, in its control over the proceedings of its officers, before a new deed is made, to set aside an irregular or imperfect one, that confusion might not arise from the two conveyances, yet the last and correct deed is not void, and it cannot be impeached in this proceeding.

The plaintiff, however, claims that notwithstanding a second conveyance may be good, and will ordinarily relate back to the sale, yet it will not do so as against the rights of intervening third parties, and that he, as a purchaser before the execution of the last deed, cannot be affected by it. Upon this subject the court

held, at the plaintiff's instance, that the second deed did not so relate back to the sale as to give the defendant the better title, unless the plaintiff when he purchased had either actual notice of the facts recited in said deed, or notice that there existed of record such proceedings as would have advised him of them. But the court refused to declare that the first deed and the first return of the sheriff were no notice, and for the reason, first, that such deed and return only constituted a part of the record, and that when the whole was sufficient notice, the court should not be called upon to give the effect of this or that part of it; and for the further reason that there was enough in the judgments, executions, returns and deed, to advise the plaintiff of the sale to defendant. In order to understand the views of the court below upon this point, its refusal to give this instruction should be considered in connection with one given at the instance of defendant, to the effect that if there was a valid sale and a deed to defendant regularly executed, acknowledged and recorded, under which he took and held possession, of which the plaintiff was informed before his purchase, and that plaintiff was told that defendant's title was defective, and purchased in consequence of such supposed defect, then he is not an innocent purchaser, and defendant's title under the last deed relates back to the sale. The view of the court was correct. The defendant was a neighbor of the plaintiff; was in open and notorious possession of the premises under his purchase, which the plaintiff well knew; but the latter was told by his law partner that the title was defective, and in consequence bid off the property for a mere nominal sum. To say that he was a stranger, and should be protected as an innocent purchaser from the operation of the well-settled rule that the sheriff's deed should relate back to the sale, would confound all our ideas as to what constitutes innocence either in a legal or moral sense.

The whole policy of the law in regard to the protection of innocent purchasers from the operation of prior titles, is based upon naked justice. For instance, in regard to the registering of conveyances, in order to prevent fraud and imposition, certain duties are imposed upon the holder of the deed; and it is enacted, and might be justly held without enactment, that those who, in

the ordinary course of business, purchase without knowledge of such conveyance, and being, by neglect of the holder, deprived of the means of information, shall not hence be made to suffer. But this policy cannot be made to cure the cases of those who would take advantage of technical defects in their neighbors' titles to deprive them of their estates. If those defects cannot be cured, they may perhaps succeed; but if any steps can be taken that, by the rules of law, shall relate back and remedy the defect, no exception to the operation of the remedy should be made in favor of such person.

The other judges concurring, the judgment will be affirmed.

ELIZABETH G. RICE, Respondent, *v.* JOHN MCELHANNON AND BARRET LEMMONS, Appellants.

1. *Practice, Supreme Court — Failure to file transcript — Damages.*—When appellant fails to prosecute his appeal as required by law, and respondent presents to this court a perfect transcript, judgment will, on motion, be affirmed. And when the appeal appears to be taken for delay, ten per cent. damages will be awarded.

Appeal from Greene Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

The respondent now brings into this court a perfect transcript of the record, and asks for an affirmance of the judgment rendered in the court below.

It appears that the appeal was allowed and taken in August, 1870, and that no steps have been taken by the appellants to prosecute the same; and as the action was on a promissory note, and the appeal seems to have been taken for delay, the judgment will be affirmed, with ten per cent. damages. The other judges concur.

STEPHEN D. FOULK, Plaintiff in Error, *v.* GEORGE W. COLBURN, Defendant in Error.

1. *Sheriff, deed of land by — Omission in to state the date of levy under the attachment — Failure of date may be supplied by parol evidence.* — In a suit for certain real estate, carried on between two purchasers under different attachment sales, to test the priority of their claims, it appeared that the sheriff's deed to defendant failed to set forth the date of the attachment and levy; that, without defendant's fault, a portion of the original files in the suit had been lost, but that enough of the record remained to advise plaintiff that there had been a writ of attachment and levy. *Held*, that the sheriff's deed was not vitiated by the failure to recite the original levy; that proof of the date of the levy might be made by parol evidence; and that, on such proof, the deed would relate back to the time of the levy.
2. *Records, lost, ordinarily may be proved by parol evidence.* — Ordinarily, if a record be lost, its contents may be proved, like any other document, by secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence.

Error to First District Court.

Elliott & Blodgett, for plaintiff in error.

I. The recital in the sheriff's deed to plaintiff, of the date of the levy of the writ of attachment in the case under which he claims, is *prima facie* evidence of the fact as therein recited, and is sufficient proof of the date of the levy when uncontradicted by other evidence. (Potter v. McDowell, 43 Mo. 93; Merchants' Bank v. Harrison, 39 Mo. 433; McCormack v. Fitzsimmons, *id.* 24; Stephens v. Thompson, 13 Ill. 191; Hardin v. Clark, 3 Jones, N. C., 137.)

II. The date of the attachment should be recited in order that the deed may show from what date the purchaser takes the title. In a proceeding *in rem*, the levy of the writ of attachment upon the land at a certain date, is the act which gives the sheriff the power to pass the title to a purchaser from such date. The seizure of the property is the foundation of the whole proceeding, without which there can be no valid judgment. (Smith v. McCutchen, 38 Mo. 417; Bois v. Vance, 32 Miss. 198.) It is well settled that a sheriff's deed must show the power under

which the sheriff acts in transferring the title from the defendant in the execution to a purchaser. (Lackey v. Lubke, 36 Mo. 124; Tanner v. Stine, 18 Mo. 582; Blackw. Tax Tit., Balch's ed., 386; Zabriske v. Meade, 2 Nevada, 288; Donahoe v. McNulta, 24 Cal. 418.)

Unless the fact of the levy of the writ of attachment and also the date thereof are both recited in the deed, the deed is defective in two important particulars: 1. It shows no power in the sheriff to make the sale, for if there is no attachment there can be no valid judgment. 2. If the date of the levy be not recited, the deed shows no power in the sheriff to pass the title to a purchaser from any definite period, and the deed is void for uncertainty, in the same manner as though the uncertainty existed in matter of description, and parol evidence is not admissible to explain it. (Mason v. White, 11 Barb., N. Y., 187.)

The judgment throws no additional light upon the question as to when the defendant's title had its inception. Both parties are bound by the recitals in their deed, and defendant will not be permitted to vary or add to his deed by parol evidence so as to give it any other or greater effect than it has upon its face, or an operation beyond the broadest scope of its own terms. (Enstein v. Gay, 45 Mo. 62; Ashley v. Bird, 1 Mo. 640; 2 Phill. Ev. 637, 644, note 487; Douglas v. Scott, 5 Ohio, 195; Singleton v. Fore, 7 Mo. 518.) Where the record of a judgment has been lost or destroyed, the first step toward obtaining a remedy is by a proceeding in the court where the judgment was given, to the end that the record may be supplied. (Walton v. McKesson, 64 N. C. 77, in Am. Law Reg., June, 1870, p. 385.) What a court of record does is known only by its records. (Wilson v. Pemberton, 12 Mo. 602; Medlin v. Platte County, 8 Mo. 238.)

The theory of the defendant, on which he bases his right to the land on matters *de hors* his deed, cannot prevail. He cannot take title partly by deed and partly by parol. Having accepted a deed defective in its terms, he is bound by it. (2 Nevada, 288; Tanner v. Stine, 18 Mo. 587; Donahoe v. McNulta, 24 Cal. 417–18.) So rigid is the rule concerning the execution of deeds of this character, that an imperfect execution of a statutory

power will not be aided even by a court of equity. (Moreau v. Detchemendy, 18 Mo. 587; 1 Sto. Eq. Jur., §§ 96, 177.)

Defendant in error insists that he is not bound to recite in his deed the date of the levy of the attachment in the case through which he claims, because the statute does not expressly require it; but this court has held, where the statute is silent as to what recitals shall be contained in a statutory deed, that the form must be adapted to the facts in the case, and that construction cannot be employed to give such a deed an effect beyond the broadest scope of its own terms. (Enstein v. Gay, 45 Mo. 63.)

Nickerson & Hicks, for defendant in error.

I. The record of the case of Colburn v. McCown became and was a muniment of title for the defendant and purchaser, and the loss being admitted, it was competent to prove its contents by parol. (Armstrong v. McCoy, 8 Ohio, 135; Ravenscroft v. Giboney, 2 Mo. 1; 8 Mo. 115; 4 Mo. 39; Graham v. O'Fallon, 3 Mo. 351; 28 Me. 367; 38 Me. 456.)

II. The evidence to establish the contents of the lost record does not contradict or vary the deed offered in evidence by Colburn. But it constitutes the authority by and under which the special judgment against McCown was rendered, and without which no valid judgment could have been rendered, and is evidence of a higher nature than the sheriff's deed. (Armstrong v. McCoy, *supra*; 12 Mo. 529.)

The law does not require the date at which the land was attached to be recited in the sheriff's deed (Gen. Stat. 1865, tit. Executions; Tanner v. Stine, 18 Mo. 587); hence the loss of the record cannot impair or divest the defendant's title.

Plaintiff had notice of the prior lien and attachment of the land in the suit of Colburn v. McCown, when he purchased and received his deed, sufficient to put him on inquiry, and that was enough. (1 Paine, C. R., 462; 1 Paige, 461; *id.* 202; Green v. Slater, 4 J. C. 38; 3 Johns. 526.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff seeks to recover certain real estate, and both parties claim title through execution sales upon different judgments in attachment against one McCown. The original levy in the attachment proceedings under which defendant holds, is claimed to have been made previous to that in the other case, and the questions raised pertain exclusively to the defendant's title. His deed from the sheriff makes no allusion to the original levy, so that it does not appear from it when it was made; and the plaintiff claims that this is a fatal omission.

The statute does not specify what recitals in sales upon attachment a sheriff's deed shall contain. After the judgment, a special *fi. fa.* issues to sell the property seized, and the deed is governed by the provisions of the statute upon executions. The one under consideration is regular unless in the particular named. The judgment and order of sale are described, but the deed does not mention the date of the original levy, nor does the judgment or order refer to it; so that, without reference to the original writ and the return of the sheriff upon it, it cannot be told when the property was seized.

It would seem that the special execution, like an ordinary *venditioni exponas*, would naturally refer to the seizure of the property as well as to the judgment and order of sale. Both are proceedings that precede the sale, and without which no title will pass. Yet it is to be presumed that the court had authority to issue the order — that it would not have been issued unless there had been a levy upon the property ordered to be sold — and the order itself must be held to be sufficient authority for the officer to proceed. The statute gives no form for a special *fi. fa.*, nor does it direct what recitals it shall contain, or require it to describe the manner in which the property came within the control of the court. A common *fieri facias* simply refers to the judgment, and in analogy to that the writ under consideration refers to the judgment and the order to sell, describing the property; and we cannot say that it is not a special *fieri facias* under

the statute, though it neglect to show the authority of the court to make the order.

If it is not essential that the order of sale describe the levy, then it cannot be required in the deed; for the recitals called for by the statute are only such particulars as are "recited in the execution" (Gen. Stat. 1865, ch. 160, § 54; Wagn. Stat. 612), and this is necessarily so, inasmuch as no other paper is in the hands of the sheriff. The deed, then, is not vititiated by failing to recite the original levy; and when the date of such levy becomes material, resort must be had to the record.

Upon the trial the defendant, in addition to his deed, offered in evidence the judgment, proved that the original attachment writ, with its return, had been lost from the files, and then showed by the testimony of the sheriff who had served it, the date of the writ and the date of the levy, the sheriff giving a copy of his return. But the court refused to consider any evidence except the deed and its recitals; and hence, as defendant's deed did not recite the levy, gave judgment for the plaintiff. The court did not hold the defendant's deed to be void, but refused to make it relate back beyond the date of the judgment, for the reason that it recited no previous proceedings. In this it was clearly wrong, for unless there had been a valid levy the deed was worthless, as having nothing to lean upon; and if good, it related back to the levy upon which it depended. The levy was its life and the source of the title conveyed by it.

It is not easy to determine the grounds upon which the court based its opinion. It might have held that the deed did not relate back to the levy, because there was nothing of record to notify the plaintiff when it was made, or whether made at all. It is true most of the original files were lost; but is it true that when the process and pleadings in an action are mislaid or destroyed, although the judgment remains duly entered in the book of orders and judgment, and which could not have been lawfully rendered without such process and pleadings, that no one is notified of the proceedings in the action? In the present case the loss was not the fault of the defendant, and there was enough preserved upon the record and recited in the deed to advise the

plaintiff that there must have been a writ and levy as well as pleadings. The evidence shows that the plaintiff, before the purchase, actually searched the clerk's office to find the missing files. He was put upon inquiry in relation to the levy, but did not pursue it far enough to ascertain what has appeared in evidence. Were it the defendant's fault that the plaintiff was obliged to go beyond the clerk's office for information, he might have been excused. But the records being lost without his fault, all parties were bound by what they could be proved to contain. The loss should not be visited upon the defendant; otherwise the title to our estates would in many cases be made to depend upon the carefulness or fidelity of clerks of courts, or perhaps upon the honesty of those intrusted with, or who might obtain access to the public records.

Objection is made to the parol evidence establishing the contents of the lost record. It is true that an action cannot be maintained upon a lost record without first establishing or restoring it by a direct proceeding, for the reason that if its existence is put in issue, the court passes upon it by an inspection of the record. (Walton v. McKesson, 64 N. C. 77.) Nor will one be permitted to proceed in the prosecution of a suit and take a default upon proof of loss and contents of the petition, for the defendant has no opportunity to answer until it is restored. (Brown v. King, 39 Mo. 380.) But ordinarily, if a record is lost "its contents may be proved like any other document, by any secondary evidence, when the case does not from its nature disclose the existence of other and better evidence." (Greenl. Ev., § 509; Graham v. O'Fallon, 3 Mo. 507; Ravenscroft v. Giboney, 2 Mo. 1.)

The judgment of the District Court, reversing that of the Court of Common Pleas, will be affirmed. The other judges concur.

H. N. ELLS, Respondent, *v.* PACIFIC RAILROAD, Appellant.

1. *Corporations — Railroads — Line of track should be fenced through towns and cities, when.* — A railroad company is not excused from fencing the track of its road through a town or city merely because of its passage through such locality, without reference to the question whether it crosses the public highways of a town or city.
2. *Corporations — Railroads — Damages for failure to fence, when plaintiff contracts with company to fence.* — One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground for action of damages for killing of stock, even though the statute makes it imperative on the company to fence.

Appeal from Cooper Circuit Court.

J. N. Litton, for appellant.

I. A contract by a railroad with a land-owner to fence the road through his ground, is a good answer to him for killing his stock. (Indiana R.R. v. Petty, 25 Ind. 413; Johnson v. Milwaukee R.R., 19 Wis. 139; Corwin v. N. Y. & Erie R.R., 13 N. Y. 49; Talmadge v. R. & S. R.R., 13 Barb. 493; Towles v. R. & S. R.R., 18 Barb. 583; 2 Hill, N. Y. Com. Pleas, 496; Easter v. L. M., 14 Ohio St. 48; Cin. & Ham. R.R. v. Waterman, 4 Ohio St. 424; 33 Cal. 230; St. Louis & Cin. R.R. v. Todd, 36 Ill. 409; Terre Haute R.R. v. Smith, 16 Ind. 102; 1 Redf. Railw. 466, § 6, p. 494, § 24; Pierce on. Am. R.R. 344; Shearm. & Redf. Negl. 383, § 319.) Was there the slightest evidence or admission tending to prove these facts?

II. Defendant need not fence in cities. (Iba v. Hann. & St. Jo. R.R., 45 Mo. 472; 1 Redf. Railw. 494, § 25; 20 Ind. 231; Parker v. Rensselaer, etc., 16 Barb. 316; 13 Barb. 390; Great Western R.R. v. Morthland, 30 Ill. 458; Galena R.R. v. Griffin, 31 Ill. 303.)

Hayden & Tompkins, for respondent.

The fourth instruction asked by appellant was properly refused by the Circuit Court. In Meyers v. North Mo. R R., 35 Mo. 352, this court decided that the railroad was not liable for

killing a cow within the limits of the city of St. Louis, at a point on its track not fenced, opposite an unimproved street, but which had been set aside by its owner for a street, and so dedicated to the public. The doctrine of this case was afterward partly recognized by this court in the case of Iba v. Hann. & St. Jo. R.R., 45 Mo. 469, but not, as we think, extended. It is true, in the case last mentioned the court says that the obligation to fence could not be extended to towns and cities, and gives as a reason that, though the streets are not actually opened, they are liable to be at any day, when the fence would be found an obstruction to crossing. The court then gives as authority Meyers v. North Mo. R.R. Co., *supra*.

Bliss, Judge, delivered the opinion of the court.

Defendant leased and ran the Osage Valley & Southern Kansas Railroad, and plaintiff charges that the cars upon the road so leased run over and killed his mule and a colt, etc., and that they were killed upon a portion of the road not inclosed by a fence. We will only consider two of the defenses set up, which are, first, that the place where the animals entered upon the track was within the incorporated town of Boonville, and hence the company was under no obligation to fence the road; and, second, that the O. V. & S. K. Railroad had made a contract with the plaintiff to inclose the road with a fence at that place, and had paid him for the same. Both defenses were sustained by the evidence, but the court held them insufficient, and gave the plaintiff judgment for $500.

In regard to the first defense, it appeared that the portion of the town where the accident happened had not been laid out into lots, streets and alleys, and that no road or street had been established to cross the railroad near that point. This action is prosecuted under the fifth section of the act concerning damages, etc. (Wagn. Stat. 520), and the question is raised for the first time in this court, whether a railroad company is excused from fencing the track of its road when it runs through a town or city, merely from that fact, and without reference to whether it thereby

crosses the public highways of such town or city. From the remarks of the court in Meyer v. N. M. R.R. Co., 35 Mo. 352, and in Iba v. Hann. & St. Jo. R.R. Co., 45 Mo. 469, such excuse seems to be inferred by counsel. But the statute makes no exception in regard to towns, but only an implied one in the crossing of a public highway. Nor do the cases referred to enlarge the exception. Ordinarily a railroad track cannot run any considerable distance within a town without being crossed by some street, either actually opened or merely established. In that case the fencing cannot be required, for it would shut up a street actually in use, or one that has been laid out and dedicated and may soon be opened. But where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that no streets cross the railroad, the reason for the exception does not apply, and the obligation to fence is as imperative as outside the corporation limits.

The second defense is a perfect one as against this plaintiff. Defendant claims that the railroad company whose road it leased had taken the proper steps toward complying with the law, and that it was the fault of the plaintiff that it had not been fully complied with. To permit him to take advantage of this default would be contrary to reason and justice; would give him damages for the failure in the company to do what he had bound himself to do and had been paid for doing. (The President, etc., v. Smith, 16 Ind. 102; Ind., P. & C. R.R. Co. v. Petty, 25 Ind. 413.) The reports of the different States are full of authorities sustaining this view, and it applies as well to cases where the statute requires the railroad company to fence as to where there is no such requirement. The following instruction upon this point was asked and refused:

"If the jury believe from the evidence that the plaintiff agreed and contracted with the Osage Valley & Southern Kansas Railroad Company to build a fence along the line of said railroad and on plaintiff's land, and failed and neglected to build said fence, and by reason of such neglect and failure on the part of the plaintiff, stock belonging to plaintiff came upon the track of said road at a point where plaintiff had agreed to fence, and was

killed by the engines and cars of defendant running on said road, they will find for defendant."

There was no evidence of any carelessness and negligence on the part of the company except the neglect to fence, and the refusal to give the above instruction was clearly erroneous; and the other judges concurring, the judgment is reversed and the cause remanded.

JOHN G. MACLAY AND JOHN M. VIMONT, Respondents, *v.* WILLIAM N. FREEMAN, Appellant.

1. *Partnership, community of profits essential to.*—An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the essential characteristic of every partnership agreement.

Appeal from Cooper Circuit Court.

J. Cosgrove, for appellant.

Wear & Johnson, for respondents.

CURRIER, Judge, delivered the opinion of the court.

The defendant is sought to be charged as a member of the firm of Freeman & Brother. At the trial the court, at the instance of the plaintiffs, gave the following instruction: "If the jury believe that the defendant, William P. Freeman, was a member of the firm of Freeman & Brother, at New Palestine, Mo., in November, 1868, and subsequently thereto, or had any interest whatever in the stock of goods there, * * * or in the business of said firm, * * * they will find for the plaintiffs." This instruction cannot be upheld. It states the law of partnership too broadly. The defendant might have had an interest in the stock of goods without being concerned in the *profits* of the business, and the latter is the material matter. An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is

the essential characteristic of every partnership, and is the leading feature in every definition of the term. It is true that a person may be held, under certain conditions, as a partner as to third parties when he is not so in fact, as between himself and those with whom he has claimed to be associated. But that is not the case contemplated by the objectionable instruction.

The judgment rendered by the court is subject to the further objection that it is an entire judgment against three parties, when only one of them appears to have been subject to the jurisdiction of the court. It will be reversed and the cause remanded. The other judges concur.

E. J. THURMAN, Respondent, *v.* WILLIAM JAMES, Appellant.

1. *Practice, civil—Jeofails, statute of—Dismissal and discontinuance.*—Under the statute (Wagn. Stat. 1036, § 19) no judgment, after an actual trial or submission, will be affected by any previous dismissal of the suit. And *semble*, that where parties appear and go to trial after an order of dismissal, it will be presumed to have been set aside.

Appeal from Morgan Circuit Court.

J. A. Spurlock, for appellant.

J. T. Campbell & Pemberton, for respondent, cited the statute of *jeofails* (Wagn. Stat. 1036, § 19).

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding by motion to quash an execution and vacate the judgment upon which it was issued. It is claimed that the judgment was rendered without notice to the defendant, and the supposed want of notice is the ground stated in the motion for setting aside the judgment.

The record, however, shows that the parties were present in court; that they appeared by their respective attorneys; that the case was tried by the court, and a judgment rendered for the plaintiff to recover of the defendant the sum of $25. So far

the record shows a regular and formal judgment, the parties being present and consenting to the proceedings. Whether or not they were brought in by virtue of any antecedent process or proceeding, is perhaps not important, since the statute (Wagn. Stat. 1036, § 19) provides that no "judgment, after trial or submission," shall be impaired or affected for any "default or defect of process," or because of any antecedent "miscontinuance or discontinuance." The parties having appeared and submitted themselves to the jurisdiction of the court, the judgment cannot be disturbed by a prior discontinuance, or because of any want or defect of antecedent proceedings.

It appears in the case before us that the suit had been dismissed by consent of parties, and the record fails to show, except inferentially, that the order of dismissal had been set aside. The dismissal had the effect of a discontinuance; and, as we have seen, the statute provides that no judgment, after an actual trial or submission, shall be affected by any previous discontinuance of the suit. In practice, a dismissal and a discontinuance amount to the same thing, and are but different words employed to convey the same idea, namely, that the cause is sent out of court. The objection, therefore, that the cause had been previously dismissed, is without force. It has been decided, moreover, that when a verdict on which a judgment has been rendered is set aside and a new trial had, it will be considered that the judgment was also set aside, although the record fails to show that fact. (Lane v. Kingsberry, 11 Mo. 402.) It might on the same principle, as it occurs to me, be considered in this case that the order of dismissal was set aside, since the parties appeared and went into a trial, and the court assumed jurisdiction of the case and rendered a judgment therein. It is to be presumed that courts act regularly unless the contrary appears.

It is not suggested that the attorneys appeared without authority, or that the judgment was excessive in amount, or even for the wrong party.

It is further urged, as a reason for setting aside the judgment and quashing the execution, that the court rendering the judgment had ordered the stay of a prior execution issued upon that

judgment. The record fails to show that fact. It simply shows that the court ordered the sheriff to "suspend the sale" of certain property seized under the former execution. The order of suspension did not affect the validity of the execution or disturb the judgment upon which it was issued. I see nothing in the case that would warrant a reversal of the judgment of the court below, and it will accordingly be affirmed. The other judges concur.

WILLIAM S. GIBBS, Respondent, *v.* J. C. SULLENS, Appellant.

1. *Ejectment, by vendor against vendee — Latter must show payment of purchase money.* — When a party goes into possession under a contract of purchase, and makes default, he is liable to be turned out in an action of ejectment. And in such action by the vendor against the vendee, the latter can only defend his possession by showing a performance of the contract on his part, and that he is not in default.

Appeal from Morgan Circuit Court.

J. C. Campbell & Pemberton, for appellant.

Defendant cannot be ejected after he has laid out his money on the contract. It would work a fraud upon him. (25 Mo. 63; 23 Mo. 423.) There was part performance of the verbal contract, and it ought to be enforced entire. (28 Mo. 134, 604; 35 Mo. 316.)

The payments made to plaintiff the law required to be applied to the individual indebtedness in the absence of directions to the contrary. There is no evidence that defendant knew that plaintiff was a member of the firm, or that defendant was indebted to it. (2 Pars. Cont. 631–4, and notes.)

A. W. Anthony, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is an action of ejectment. The defendant relies upon an equitable defense. His answer sets out, in substance, that the defendant is in possession of the premises sued for, as the plaintiff's vendee under a contract of purchase, and that the purchase

money has been fully paid. He asks that the title may be decreed to him. The averments of the answer were put in issue by a replication.

The questions discussed here arise upon the action of the court in giving and refusing instructions. On the main issue the jury were told, in effect, that their verdict should be for the defendant in case they found from the evidence the existence of the alleged contract of purchase, and that the defendant had either "paid some considerable portion of the purchase money, or had made such valuable and lasting improvements on the premises as would work materially to his injury if he should be ejected." This was certainly sufficiently favorable to the defendant. The theory of his answer is that the purchase money was paid in full, and that the plaintiff was, in consequence of that fact, bound to convey. If he had neither paid any considerable part of the contract price, nor made such valuable and lasting improvements upon the property that his ejectment would work material injury to him, what pretense can there be that the defense was made out? There is no claim set up that the time in which the payments were to be made had not fully elapsed. The contract of purchase was made in 1867, and the plaintiff testifies, and on that point is not contradicted, that the payments were to be made within one year from the making of the contract. Where a party goes into possession under a contract of purchase, and makes default, he is liable to be turned out by an ejectment. In such an action by the vendor against the vendee, the latter can alone defend his possession by showing a performance of the contract on his part, and that he is not in default. (Glascock v. Robards, 14 Mo. 350; Tyler on Eject. 565.)

The defendant based his right of possession solely upon the ground of his purchase and equitable ownership. The instruction, therefore, in relation to the supposed tenancy, was properly refused. Besides, it is perfectly apparent that the parties did not regard themselves as standing in relation to each other as landlord and tenant. The defendant himself denies any contract of renting. According to the defendant's testimony — and there is no controversy on that point — the alleged contract of purchase was made in 1867.

The main items set out in his answer as applicable in the way of payment to the purchase money, accrued, as the answer shows, in 1866, and therefore before the purchase. These items were credited by the plaintiff to the defendant on the books of Gibbs & Wilson, the plaintiff being the senior member of that firm. The items amount in the aggregate to $415.60. The plaintiff testified, and therein was not contradicted, that he advanced to the defendant $300 in 1866, which was entered on Gibbs & Wilson's books, and that Gibbs & Wilson had a further account with the defendant, and that in an adjustment of the accounts there was a balance against the defendant, leaving nothing to apply on account of the purchase. A question is here raised as to the application of payments. The defendant gave no directions on that subject. He asked the court to instruct the jury as follows: "If Sullens was indebted to Gibbs on account of the lots in controversy, and was also indebted to Gibbs & Wilson on account, and during such indebtedness paid *money* to Gibbs without instructions to apply such payments to the account of Gibbs & Wilson, then such application was unauthorized, and the jury will regard such payments as made to Gibbs on his individual account against Sullens." The instruction is misleading if not otherwise objectionable. The jury might well have interpreted it as directing them to apply the "money" payments to the purchase money, leaving out of view the $300 loan by the plaintiff, and leaving out of view also the fact that no money was paid to the plaintiff after the purchase. The prior money payments should undoubtedly be applied to the liquidation of the prior money loan. The evidence is that the $300 was loaned by Gibbs and not by the firm of which he was a member. The mere entry of it upon the firm books did not make it a firm transaction. The result of the whole matter is that the defendant's equitable defense does not appear to have much equity in it.

The judgment will be affirmed. The other judges concur.

THE STATE OF MISSOURI, Defendant in Error, *v.* HENRY WASHBURN, Plaintiff in Error.

1. *Criminal law — Larceny — Indictment — Absence for purpose of avoiding arrest, equivalent to fleeing from justice — Construction of statute.* — Under an indictment for larceny the jury were properly instructed that the time during which defendant was out of the State or away from his usual place of abode, for the purpose of avoiding arrest or prosecution, should not be included in the period limited by the statute for the prosecution. Under that law (Wagn. Stat. 1120, § 28) absence for the purpose of avoiding arrest would amount to a "fleeing from justice."

Error to Miller Circuit Court.

Lay & Belch, for plaintiff in error.

A. J. Baker, Attorney-General, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted at the September term, 1870, of the Miller County Circuit Court for the crime of larceny committed in 1867. To avoid the bar of the statute of limitations, the indictment alleged that immediately after the commission of the larceny the defendant "did flee from justice and remain away for the period of two years in some secret place to the jurors unknown."

Upon the trial the defendant was convicted and sentenced to the penitentiary. The evidence is not preserved in this record, and we can only examine the instructions so far as to see whether they were justified by any issue or allegation made by the indictment. The indictment, to break the force and effect of the statute of limitations, avers fleeing from justice only.

The second instruction given for the State tells the jury what punishment they shall assess against the prisoner if they find that he committed the offense, and then concludes as follows: "Provided, however, that they must further find that the crime was either committed within three years prior to the finding of the indictment in this cause, or that, if committed more than three

years before the finding of said indictment, the defendant did flee from justice to escape prosecution for the crime."

The eighth instruction declares that "any portion of the time the defendant may have been out of this State, or away from his former usual place of abode in this State, for the purpose of avoiding arrest or prosecution, cannot be received as a part of the three years the statute of limitations gives as a bar to the prosecution."

The statute fixes the period of limitations, but provides that "nothing contained in the two preceding sections — the sections defining the limitations — shall avail any person who shall flee from justice; and in all cases the time during which any defendant shall not have been an inhabitant of or usually resident within this State, shall not constitute any part of the limitation prescribed in the preceding sections." (2 Wagn. Stat. 1120, § 28.) That the second instruction is correct and responsive to the indictment there can be no doubt. The only difficulty is whether the eighth instruction was justified by any averment contained in the indictment. The twenty-eighth section of the statute embodies two alternative clauses, either of which will be a bar to the limitation. The indictment is rested on the first clause, and it is contended that the eighth instruction is founded upon the second. According to the statute, the time in which any defendant is not an inhabitant of or usually resident of this State is not to be counted. And this is so without regard to the motives which induced him to leave our jurisdiction. But the instruction tells the jury that any part of the time that the defendant may have been out of the State or away from his usual former place of abode, for the purpose of avoiding arrest or prosecution, will not be a bar under the statute. If he went away for the purpose of avoiding arrest or to escape prosecution, that would certainly be fleeing from justice. As we before said, there is no evidence preserved in this record, and we are bound to presume that the instruction was predicated on evidence properly before the court. We cannot say as matter of law that it was wholly unwarranted and unjustifiable.

There is no error in the record that we can see; the motion for a new trial has no merits. The affidavits do not show that the defendant was in any way surprised, and they exhibit the clearest want of diligence.

The judgment must be affirmed. The other judges concur.

STATE OF MISSOURI *ex rel.* J. W. MOORE, CIRCUIT ATTORNEY, Plaintiff in Error, *v.* W. H. LUSK, Defendant in Error.

1. *Officer, acceptance of office incompatible with another office — Offices of county and circuit clerk not incompatible.* — The acceptance, by the incumbent of one office, of another, and one whose duties are incompatible in law therewith, will vacate the former. But the duties of clerk in one court are not incompatible with those of another simply because the two courts may hold their sessions at the same time. The offices of clerk in the Circuit and County Courts having been long and notoriously held in various parts of this State by the same person, without legislation relating thereto, while other offices have been pronounced incompatible, such silence of the Legislature is equivalent to its sanction.

Error to Cole Circuit Court.

H. B. Johnson, for plaintiff in error.

H. Flanagan, *Ewing & Smith*, and *E. L. Edwards & Sons*, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

A writ of *quo warranto* was sued out of the Cole Circuit Court against the defendant to test his right to hold the office of county clerk, he having been elected to and having entered upon the duties of the office of clerk of the Circuit Court. The relator claims that by this act he has in effect surrendered the office of county clerk, for the reason that the duties of the two offices are incompatible in law. If this were so, there is no doubt that the acceptance of the second office would vacate the first (State *ex*

rel. Owens v. Draper, 45 Mo. 355); and counsel have given some forcible illustrations of the difficulty arising under some circumstances in holding both offices by the same person. But their incompatibility consists not so much in the nature of their duties as in the fact that both courts may be sitting at the same time, so that the clerk must be personally absent from one. But this difficulty has never been recognized in Missouri as necessarily constituting incompatibility in a legal sense, inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.

Another and conclusive reason against the views of the relator arises from the customs of the State. From our earliest history, in a large portion of the State, those offices have been held by the same person, and no question has been raised as to their compatibility. With this general and well-known practice, we have had legislation declaring other offices incompatible, but none in regard to these. We are bound to regard it as a tacit legislative approval of the practice — an indorsement that demands the weightiest reasons to warrant us in disregarding it.

Judgment affirmed. The other judges concur.

Township Board of Education of Township 44, Range 12, Respondent, *v.* John G. Hackmann, Appellant.

1. *Eminent domain — Appropriation of property for local schools constitutional.* — An appropriation of property for the use of a local school (see Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327, 328, §§ 3, 4) is an appropriation of it to a public use, within the meaning of section 16, article 1, of the State constitution.
2. *Practice, civil — Pleadings — Answer after demurrer overruled, effect of.* — A defendant who answers upon the merits after demurrer overruled, thereby practically withdraws the demurrer and waives all technical objections to the petition.

Appeal from Cole Circuit Court.

Edwards & Son, and *G. T. White*, for appellant.

The use must be such as is public in its character, and not merely public because declared such. (East St. Louis v. St. John, 47 Ill. 90; Am. Law Reg. 56; *id.* 164–75; Buffalo & N. Y. R.R. Co. v. Brainard, 5 Seld. 100; 6 How. 545.) "If there is no public necessity, there is no public right, and land taken without such necessity is unlawfully taken, though paid for." (3 Pars. 542; Newby v. Platte County, 25 Mo. 258; Bennett v. Boyle, 40 Barb. 551; 1 Simmons, 412; 44 Mo. 540.) No public inconvenience could have been caused by the location not being made in appellant's field, and it operating as a private mischief. (44 Mo. 486.)

H. B. Johnson, with *A. Budd*, for respondent.

I. The statutory provision (2 Wagn. Stat. 1247, § 26) authorizing the condemnation of land for public use as a site for a school-house, is constitutional. (Curtis, Adm'r, v. Whipple, 24 Wis. 350; Williams v. School District, 33 Verm. 271; Cooley on Const. Lim. 533, and cases cited.)

II. When the use for which property is taken is of a public character, it rests with the wisdom of the Legislature to determine when and in what manner the public security requires its exercise; and with the reasonableness of the exercise of that discretion the courts will not interfere. (Williams v. School District, *supra*; Charles River Bridge v. Warren Bridge, 11 Pet. 420; Swan v. Williams, 2 Mich. 427; Beekman v. Sar. & S. R.R. Co., 3 Paige, 73; Harris v. Thompson, 9 Barb. 350; Hartwell v. Armstrong, 19 Barb. 166.)

III. Whether in this particular case the requisite necessity existed for taking this particular piece of land, was a question of fact to be determined solely by the majority of the voters of the sub-district. (Williams v. School District, *supra*; Paine v. Leicester, 22 Verm. 44; West River Bridge Co. v. Dix, 16 Verm. 446.)

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding under the statute (Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327–8, §§ 3, 4) for the condemnation of land for a public school-house site. The constitutionality of the law authorizing such condemnation is called in question, and its invalidity, as in conflict with section 16, article I, of the constitution, is insisted upon as a ground for reversing the judgment of the court below. This is the main matter urged against the action of the Circuit Court.

The ground is taken that the appropriation of property for the use of a local school district is not an appropriation of it to a *public use*. This theory is based upon the notion that the proposed use is local and limited, and not for the benefit of the public generally. On this subject Poland, J., in Williams v. School District No. 6 (33 Verm. 271), makes the following observations: "Every public use is to some extent local, and benefits a particular section more than others. Railroads and canals, the most extensive of our public works, do so in some degree. Burying-grounds, aqueducts, mills, and many highways, are as purely local as this, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way this may be for the benefit of any citizen. But the use in the present case (that of a public school-house) has a more enlarged and liberal view. It is a benefit and advantage to the whole country that all the children should be educated, and thus, by means of educating the children in a single district, benefits the whole. To accomplish this great object of educating the whole, it becomes necessary that a great number of schools should be supported to make them accessible to all; but the principle remains the same as if all the children of the State could attend a single school; they are all but separate means to accomplish the same great and general benefit."

I concur in these views and adopt them as my own, and am consequently of the opinion that the objection taken to the constitutionality of the law in question is not well founded. In the case above cited the subject of taking private property for public

use is exhaustively examined, the prior decisions reviewed, and the whole matter placed in a strong and clear light. (See also Cooley on Const. Lim. 520 *et seq.*)

The process of condemnation, in the case now before the court, was conducted with observable care and circumspection. The provisions of the statute governing the proceedings appear to have been consulted and scrupulously followed. I see no substantial objection to them, although they have encountered close if not captious criticism. The petition to the Circuit Court for the appointment of commissioners was, in the outset, assailed by a demurrer, but the demurrer was overruled and subsequently in effect abandoned, although the questions sought to be raised by it have been argued here. When the demurrer was overruled the defendant answered upon the merits, and thereby practically withdrew the demurrer and waived all technical objections to the petition. (Pickering v. Mississippi Valley Telegraph Co., 47 Mo. 459.) There is no motion in arrest to test its sufficiency in matter of substance.

Commissioners were appointed in accordance with the prayer of the petition, who in due time returned into court their report, to which no exceptions, as contemplated by the statute, were taken. (1 Wagn. Stat. 328, § 4.) Subsequently to the confirmation of the report and the rendition of final judgment, the defendant moved to set the judgment aside, which motion was overruled, exceptions taken, and the case brought here by appeal.

There is no pretense that the land taken was not assessed at its true value, although it is urged that the commissioners failed to take into consideration the value of a crop of corn growing upon the premises, and that this fact is shown by the report. The report shows no such fact and the objection fails. In my opinion the judgment should be affirmed. The other judges concur.

STATE OF MISSOURI, Respondent, *v.* DAVID MURPHY, Appellant.

1. Judgment affirmed.

Appeal from Cole Circuit Court.

A. J. Baker, Attorney-General, for respondent.

Lay & Belch, for appellant.

BLISS, Judge, delivered the opinion of the court.

The appellant has not brought up anything that can be called a record. He exhibits a transcript of a confused mass of papers copied with no reference to each other, and almost the only intelligible thing in it is a judgment against the defendant for five dollars for assault and battery. We are not advised whether it was regularly entered or not, but must presume it was until the contrary appears. We will not examine and decipher such a medley, and the appeal must be dismissed. The other judges concur.

RICHARD MURPHY, Defendant in Error, *v.* CAROLINE V. PRICE *et al.*, EXECUTORS, Plaintiffs in Error.

1. *Conveyances — Covenants, when merely personal.*—Although a deed on its face purports to be made by A., B. and C., "trustees," yet if the covenants of grant, bargain and sale and those of warranty are therein averred to be simply by "the parties of the first part," without further description, the covenants will be held to be merely personal.
2. *Conveyances — Covenants for seizin and quiet enjoyment, how broken.*—The covenants of indefeasible seizin contained in the words "grant, bargain and sell" would be nominally broken in all cases where there was a paramount title, even though the grantee took possession. But where the holder of such title is in possession so as to exclude the grantee, the latter is entitled to full damages, *i. e.* the purchase money and interest. So with covenant of warranty.

   When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment will be held to be broken without any other act on the part of the grantee or the claimant.

   In such cases it is not necessary, in order to recover on those covenants, to prove actual eviction.

Error to Cole Circuit Court.

This was a suit to recover damages for breach of warranty in a sale of real estate. The petition alleged, among other things, that plaintiff paid defendant for the land $400, but that plaintiff had at no time any title to or possession of the same, for the reason that defendant at no time had any title thereto, since at the time of such conveyance the same was owned by the trustees of the Methodist Episcopal Church of St. Louis.

Plaintiff on the trial offered in evidence, together with other proofs, a deed to the plaintiff of the property in controversy, executed by Thomas Williams, attorney in fact for Thomas L. Price, Alexander Lee, Joseph Brooks and James B. Gardenhire, trustees of the University of Missouri at Jefferson City, the said parties covenanting to warrant and defend the premises to plaintiff.

Plaintiff also proved that one Morrow owned and had possession of the tract of land on which the lot mentioned in the deed was situated, that Price never owned it or had possession, and that plaintiff never got possession under his deed.

G. T. White, for plaintiffs in error.

The motion in arrest should have prevailed, if for no other reason, because the petition alleges the buying of the lot of the trustees of the university, and then avers that plaintiff never got possession of the lot, and assigns for the reason of his not getting possession that Price at no time ever had title. It is not pretended that Price was the corporation, or that the lot was bought of him.

Lay & Belch, for defendant in error.

I. The covenants contained in the deed are in fact personal ones, but even if the parties had covenanted as trustees, they are still personally liable. (Mitchell v. Hadyen, 4 Conn. 495; Belden v. Seymour, 8 Conn. 19; Sumner, Adm'r, v. Williams, 8 Mass. 162; Donahoe v. Emery, 9 Metc. 63; Duvall v. Craig

et al., 2 Wheat. 45; Rawle on Cov. 570–2; Magwire v. Riggin, 44 Mo. 512; 23 Mo. 151.)

II. It is not necessary that the plaintiff should show eviction before he can claim compensation for damages. If the conveyance made to him was void, or there was a paramount title and possession in another, he is not compelled to attempt an unlawful entry or to suffer eviction or ejectment. His inability to obtain possession by reason of paramount title in another, in fact amounts to an eviction. (Rawle on Cov. 251–5; Drew v. Towle, 10 Foster, 531.)

Bliss, Judge, delivered the opinion of the court.

This is an action upon the covenants of a deed of conveyance executed by defendants to plaintiff, and the record presents several questions for our consideration.

1. Upon breach of covenants, are the defendants personally liable? The deed is an indenture "made and entered into between Thomas L. Price, Alexander Lee, Thomas Williams, Jos. Brooks and James B. Gardenhire, trustees of the University of Missouri, at Jefferson City, of the first part, and Richard Murphy, etc., of the second part," and "witnesseth, that the said parties of the first part, for and in consideration," etc., "have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part," etc.; and further, that "the said parties of the first part, for themselves, their heirs, executors and administrators, covenant to warrant and forever defend," etc.

These covenants, both the statutory ones embraced in the words "grant, bargain and sell" and that of warranty, are merely personal. The grantors describe themselves as trustees, but they do not grant as trustees or warrant as trustees, nor do they describe the corporation as granting or warranting. The whole is so clearly personal that it becomes unnecessary to consider whether they had authority to bind the corporation; for if they had not, although the words of the instrument show that the trustees did not covenant for themselves, they would be personally liable as having exceeded their authority. (Sumner v. Wil-

liams, 8 Mass. 162; Mitchell v. Hazen, 4 Conn. 495; Belden v. Seymour, 8 Conn. 19; Duvall v. Craig, 2 Wheat. 45; Donahoe v. Emery, 9 Metc. 63.) Nor are we advised whether the University of Missouri was in fact a corporation. So far as appears, it might have been unincorporated—a mere voluntary association of the persons named as trustees, so that they represented only themselves.

2. The grantee has never been actually evicted, and hence it is claimed that the covenants have not been broken. But the record shows that the grantors were not in possession, and did not and could not give possession to the grantee. Thus were the covenants all broken. The covenant of indefeasible seizin embraced in the statutory words "grant, bargain and sell" would be nominally broken in all cases where there was paramount title, even though the grantee took possession. But where the holder of such title is in possession so as to exclude the grantee, he is entitled to full damages, *i. e.* the purchase money and interest. And so with the covenant of warranty. Though eviction either actual or constructive, by being obliged to purchase in the paramount title, is held to be necessary where the grantee is put in possession, yet "when, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or warranty will be held to be broken without any other act on the part of the grantee or the claimant, for the latter can do no more toward the assertion of his title; and, as to the former, the law will compel no one to commit a trespass in order to establish a lawful right in another action." (Rawle on Cov., 3d ed., 255.)

3. The petition charged generally that defendant executed the deed, while the evidence shows that it was executed through an attorney in fact, who was duly authorized by power of attorney. This is no variance, as is claimed. Pleadings should not set out the evidence, and it is equally the execution of decedent whether done personally or by attorney.

Some other points were made which we do not think it necessary to consider, and the other judges concurring, the judgment will be affirmed.

STATE OF MISSOURI, TO USE OF JACOB LIECHTER *et al.*, Defendant in Error, *v.* FRED. MILLER *et al.*, Plaintiffs in Error.

1. *Execution — Constable's bond, action on — Judgment on which execution was based must be proved.* — In suit on a constable's bond for failure to make levy on an execution, defendant cannot call in question the regularity of the judgment on which the execution was founded, but plaintiff must prove that the judgment was rendered.
2. *Execution — Constable's bond — Action on for failure to levy — Measure of damages.* — In an action on a constable's bond for failure to make a levy on an execution, the measure of damages would be the amount of complainant's actual injury resulting from the negligence or misconduct of the constable, and not the amount called for by the face of the execution.
3. *Justice of the peace — Acts of after expiration of term of office.* — When a justice of the peace continued to act officially after the expiration of his commission, his continued acts *colore officii* within the jurisdiction of a justice *de jure* were valid as to third parties, and could not be collaterally drawn in question.

Error to Cole Circuit Court.

E. L. King & Bro., for plaintiffs in error.

Geo. T. White, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

This is a suit upon a constable's bond to recover damages for an alleged neglect to levy and return a justice's execution according to its command. It is alleged in the petition that the plaintiffs in the execution, on the first day of October, 1868, recovered judgment against the defendants in the execution for $208.15 damages and costs, by the consideration of one Charles L. Wells, a justice of the peace for Jefferson township, in Cole county; that said justice issued an execution thereon, dated January 6, 1869, returnable in ninety days; that said execution was duly placed in the hands of the defendant Miller for levy and collection; that Miller neglected to levy the same and make return thereof according to law, whereby, it is alleged, the plaintiff was damaged in the sum of $208.15, for which he prays judgment, and for interest at the rate of one hundred per cent. per annum according to the provisions of the statute. (Gen. Stat. 1865, ch.

184, § 22.) The defendants answered, putting in issue the fact of the alleged judgment, and denying that Wells was a justice of the peace at the time mentioned, and averring affirmatively that Wells was not in office on the 6th day of January, 1869, the date of the alleged issuance of said execution; and further, that any process issued by him at that time was null and void.

At the trial the plaintiffs gave evidence tending to show that Wells, at the dates mentioned, was acting as a justice of the peace in Cole county, and that his signature to the alleged execution was genuine; that the execution was placed in the hands of the defendant Miller for levy and collection; that the defendant in the execution at that time had property on which it might have been levied; that no levy was made, and that the execution was not returned till after the expiration of the specified ninety days. The execution was read in evidence over the defendant's objections. It recited the rendition of judgment as set out in the petition, but no other evidence of the judgment was offered.

1. While the defendants were not at liberty in this collateral proceeding to question the regularitiy of the supposed judgment, it was nevertheless incumbent upon the plaintiffs to give evidence showing the fact of its rendition. It is not claimed that the execution in question could have any validity without a judgment to support it. Whether or not there was any such judgment, was an issue pointedly raised by the pleadings. The burden of proof was on the plaintiffs, and they wholly failed to furnish the requisite evidence of the existence of the disputed fact. It is not claimed that the recitals of the execution were any evidence of the facts recited. There was, therefore, a total failure of proof on this point, and the judgment should have been for the defendants.

2. Had the plaintiffs shown themselves entitled to recover at all, the measure of damages would have been the "amount ascertained to be due on the complaint." To ascertain this amount would involve an inquiry of damages. If, for example, the constable had collected ten dollars and neglected to pay it over, the amount due on the complaint would be ten dollars, not the amount called for by the face of the execution. In a word, the

amount due on the complaint is the amount of the complainant's actual injury, resulting from the negligence or misconduct of the constable. To the amount due the statute adds, in the way of penalty, interest from the return day of the execution at the rate of one hundred per centum per annum. This, in substance, was the construction given to the statute in Bennett v. Vinyard, 34 Mo. 216. That suit was not based on the statute, but the court took occasion to refer to the statute and comment upon it.

3. It would seem from the indications of the record that Wells' official term as a justice of the peace had expired prior to the issue of the execution. On that ground it seems to be regarded by the defendants as wholly invalid. It appeared, however, that Wells continued to act officially notwithstanding the expiration of his commission, and that he was acting as a justice at the time the execution was issued. Having been in office, his continued acts *colore officii* within the jurisdiction of a justice *de jure* were valid as to third parties, and cannot be collaterally drawn in question. (See Brown v. Lunt, 37 Me. 423, and the numerous other authorities cited in the opinion of the court.)

The other judges concurring, the judgment will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

LOUISA SCHOETTGEN, Plaintiff in Error, *v.* D. A. WILSON *et al.*, Defendants in Error.

1. *Damages — Officers, liability of, for torts of employees — Allegations in action for — What averments necessary.*—A warden or inspector of the State penitentiary will not be liable in damages for the torts of a convict, on the mere averment that they carelessly and negligently suffered the convict to go at large, whereby the injury resulted, etc. Under the statute (Wagn. Stat. 983-5, §§ 2, 5, 6, 17, 25) it was discretionary with the officers to determine how and in what manner convicts employed outside of the penitentiary should be suffered to go at large. And officers acting in a discretionary capacity will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty.

Error to Cole Circuit Court.

Lay & Belch, for plaintiff in error.

The office of defendants was mainly ministerial, and if they were in this case acting judicially, this fact must be set up in an answer, and proven like any other defense. So the court erred in sustaining the demurrer. (7 How. 130; Greenl. Ev. 399; 12 How. 404–5; 17 Verm. 609; Shearm. & Redf. Negl. 188, §§ 158–9, note 1; 26 Mo. 65; 35 Me. 129; 1 Sandf. Pl. 7; 16 Barb. 303; 3 Metc. 314; 3 Cranch, 331; 8 Mass. 389; 45 Penn. 450.)

Again, a distinction is made when the discretionary power is conferred on a ministerial officer; it is optional whether he will act or not. (1 Caines, 566; 2 Caines, 313–15; Warne v. Vorley *et al.*, Eng. L. & Eq. 218.) In this case, at most the matter was optional, and they were not compelled to act. To permit the convicts to go beyond the walls can only be justified by necessity; and if that necessity did not exist, the act was not only unauthorized by law but criminal. (1 Bish. Crim. Law, 231.) There is little distinction between a positive will to do wrong and an indifference whether a wrong is done or not. (Bish. Crim. Law, 130.) Carelessness may be criminal. This applies in negligent omission of legal duty. (Bish. Crim. Law, 230; Arch. New Crim Pr. 9.)

But the petition not only negatives any authority, but charges the act to have been done unlawfully. It charges defendants with the crime of permitting or suffering an escape. (Wagn. Stat. 482, §§ 41–2; Bouv. Law Dic.; 2 Black, 1048.)

The only discretion in the warden in working convicts outside the prison is the expediency of employing them outside. (Wagn. Stat. 985, § 25; Shearm. & Redf. Negl. 165; 3 N. Y. 463; 1 Denio, 595.) This cannot be construed to violate section 41, p. 482, Wagn. Stat. And if it should appear that the convict had been permitted to go at large unattended, and more especially he had been sentenced to the prison for the heinous crime of rape,

how can it be said that defendants are not also liable? (Am. Law Reg. 701, from 36 Cal. 478–9; Lick v. Madden *et al.*, *id.* 208, § 213.)

H. B. Johnson, for defendants in error.

I. Where public officers are required by law to exercise discretionary powers, they cannot be held liable civilly for a mistake of law or a mere error of judgment, when they act without fraud or malice. (Reed v. Conway, 20 Mo. 22; Donahoe v. Richards, 38 Me. 379; Wheeler v. Patterson, 1 N. H. 90; Griffin v. Rising, 11 Metc. 339; Jenkins v. Walden, 11 Johns. 121; Tompkins v. Sands, 8 Wend. 462; Stephenson v. Hall, 14 Barb. 222; Wilson v. Mayor, 1 Denio, 595; Rail v. Potts, 8 Humph. 225; Pike v. Megoun, 44 Mo. 491; Allen v. Blunt, 3 Sto. 742; Martin v. Mott, 12 Wheat. 31; Kendall v. Stokes, 3 How. 97; Wilkes v. Dinsman, 7 How. 89; Turner v. Sterling, 2 Ventris, 26; Ashley v. White, 2 Lord Raym. 938; Harman v. Tappenden, 1 East, 271; Cullen v. Morris, 2 Stark, 577; Shearm. & Redf. Negl., § 156 and note.)

II. Permitting a prisoner to go beyond the prison walls unguarded is not, *per se*, an unlawful act. (2 Wagn. Stat. 985, § 25.)

WAGNER, Judge, delivered the opinion of the court.

The plaintiff alleges in her petition that she is an infant female under the age of fourteen years, and that on the 20th day of July, 1869, David A. Wilson was warden and keeper of the penitentiary at Jefferson City, and that Dallmeyer and Draper were two of the inspectors of the penitentiary at that time; that by virtue of the law in such cases made and provided, the defendants had the care, custody, discipline and police of the prisoners confined therein, and that at the time aforesaid they carelessly, negligently, and unlawfully suffered, permitted and allowed a certain convict and prisoner belonging to the penitentiary to go at large, unattended by guards, without the walls of the said penitentiary; that the plaintiff, in the exercise of her legal

rights, and without any negligence or carelessness on her part, whilst walking at a considerable distance from the penitentiary, was caught by said convict and prisoner, and brutally assaulted, outraged and ravished, for which she claims damages, etc.

To this petition the court sustained a demurrer, upon which judgment was rendered, and the cause is brought up for review on writ of error. The statute places the government and management of the penitentiary in a board of inspectors, and makes the treasurer, auditor and attorney-general inspectors *ex-officio*. The board of inspectors are invested with power to make rules for the government, discipline and police of the penitentiary. They have also the power, and it is their duty, from time to time, to inquire and examine into all the matters connected with the government, police and discipline thereof.

The warden has the charge and custody of the penitentiary prison, with the lands, buildings, tools, implements, stock, provisions, and every other description of property pertaining thereto, belonging to the State; and it is his duty to superintend the internal police and discipline of the penitentiary, as required by the general laws and the rules and regulations prescribed by the inspectors.

The warden is further given authority to employ any of the convicts outside of the prison walls, in making improvements connected with the penitentiary, or at any other labor, under such regulations and restrictions as the inspectors may adopt, when he shall deem it expedient to do so. (Wagn. Stat. 983–5, §§ 2, 5, 6, 17, 25.)

The statute invests the officers above designated with a discretion as to the superintendence and control of the penitentiary and the convicts confined therein. They shall make such rules and regulations as they may deem expedient and proper for the good government thereof, and express authority is given the warden to employ the convicts outside the prison walls in making improvements connected with the penitentiary, or at any other labor, under such regulations and restrictions as the Legislature may adopt. How or in what manner the convicts who are employed outside the prison walls shall be permitted to go at large is

nowhere specified by the law, but is left to the wise discretion and control of the officers.

Officers acting within the scope of their jurisdiction and in pursuance of discretionary power devolved upon them, will not ordinarily be held responsible for an error of judgment. Discretion implies to a certain extent judicial functions; and where an officer acts in such a capacity, to render him personally liable it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty. (Reed v. Conway, 29 Mo. 221; Pike v. Megoun, 44 Mo. 491; Caulfield v. Bullock, 18 B. Monr. 494.)

In the well-known case of Wilkes v. Dinsman, 7 How. 89, the Supreme Court of the United States held that an officer invested with certain discretionary powers could not be made answerable for any injury when acting within the scope of his authority and not influenced by malice, corruption or cruelty—that his position was at least *quasi* official; and it has often been decided, and appears to be well settled, that the acts of a public officer, on public matters within his jurisdiction, and where he has a discretion, are to be presumed legal until shown by others to be unjustifiable. (Gidley v. Palmerston, 7 Moore, 111; Venderhayden v. Young, 11 Johns. 150; Martin v. Mott, 12 Wheat. 31.) This is not on the principle merely that innocence and right-doing are to be presumed until the contrary is shown, but that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty or willful oppression, or, in the words of Lord Mansfield, that he exercised it as if the heart were wrong. (Wall v. McNamara, 2 Carr. & P. 158 and note.)

In Jenkins v. Waldron, 11 Johns. 121, Spencer, J., speaking for the whole court, says: "It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberate judgments are

answerable for a mistake in law, either civilly or criminally, when their motives are pure and untainted with fraud and malice."

The averment in the petition is that the defendants "carelessly, negligently and unlawfully suffered and permitted the convict to go at large, whereby the injury resulted," etc.

We have seen that it was not unlawful to employ the convict outside of the penitentiary, for the statute expressly gives the authority in certain cases. The allegation of carelessness and negligence is too indefinite and remote. It is not easy to determine whether the pleader intended to apply the terms illegal, negligent and careless to the action of the board in framing rules and regulations for the working of the convicts when outside of the prison walls, or whether they were intended to apply solely to the action of the warden. The warden was the only person who could control them when they were laboring outside. With their personal management the inspectors had nothing to do. If the officers, acting in good faith, merely erred in judgment, in not adopting rules sufficiently stringent for the government and control of the convicts, they would not on that account be held answerable. To hold them liable it would be necessary to aver and prove that they were guilty of either willfulnesss, fraud, malice, or corruption; or that they knowingly acted wrongfully, and not according to their honest convictions of duty.

That they acted within the sphere of their jurisdiction is not disputed, and there is nothing averred showing that they acted from willfulness or a fraudulent or malicious disregard of the rights of others. Were such the case I have no doubt of their liability, but on the case as presented I think the petition is decidedly defective, and therefore the judgment must be affirmed.

Affirmed. The other judges concur.

WILLIAM C. YOUNG *et al.*, Defendants in Error, *v.* BENJAMIN CASON, Plaintiff in Error.

1. *Equity — Action to reform deed — Mistake in description of land in mortgage — Judgment liens — Relief.*—When a deed of trust by mistake omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land, obtained by a creditor with notice, after the first but before the second deed. But such action of the court can only be justified when the mistake clearly appears. No necessity can arise for a re-sale of the property where the evidence fails to show that it was sacrificed in consequence of the cloud thrown on the title by the judgment and sale.

Equity may not only enforce liens but remove them when they come in conflict with a superior equity.

Error to Cole Circuit Court.

Defendant, between the making of the first and second deeds of trust, obtained judgment against Cordell, and had the land in controversy levied on and sold.

For facts generally, see 43 Mo. 179.

H. C. Hayden, for plaintiff in error.

I. The mistake in the first deed of trust was not cured by the making of the second deed of trust, as judgment liens intervened.

II. Young did not show that he had paid the debt.

III. Those who were substituted on the record as co-plaintiffs had no *status* in court. Their claim to relief was barred by the statute of limitations, by both the five and ten-year statute.

IV. Admitting that they were all in court properly, yet the entry of a decree divesting Cason of title and vesting the same in Young was simply an enormity. Cason had the right to redeem, and there was not even a strict foreclosure, but he is cut off by the decree from even paying the entire debt and taking the property, as he had the unquestionable right to do. The only decree which could have been rendered under any circumstances was to order a sale of the real estate, after correcting and reforming the deed, and thus, afer a sale, to give Cason, the representative of Cordell and the owner of the equity of re-

demption, the benefit of the surplus. If the debt and interest amounted to $1,500 and the property was worth $5,000, Young, by the decree in this case, would get $3,500 which he is not entitled to, and which, as a matter of right and equity, belongs to Cason. The statute of limitations is a complete bar as against the new plaintiffs introduced upon the record as parties in the third amended petition. Their cause of action, if any, resulted from the payments severally made by them. Where indorsers or sureties pay the debt of the principal, their demands thus created are regarded as independent and several, and they stand in relation to each other as any other independent creditor toward a common debtor. (Harrison v. Phillips, 46 Mo. 525; 8 Cow. 168; 3 B. & P. 235; 3 N. Y. 366.)

Ewing & Smith, for defendants in error.

I. A court of equity will correct a mistake in the description of land in a deed, against a subsequent purchaser with notice. (Henkle v. Royal Assurance Co., 1 Ves. 314; Sto. Eq., § 153 and authorities cited.) This petition is not at variance with the rule of evidence that prohibits the introduction of parol testimony to vary the stipulations in a written contract, but is similar to the exception to this rule, which does permit such evidence in cases of fraud; so the position or rule contended for will permit parol evidence to correct evident and innocent mistakes of both parties to a written contract. (See Sto. Eq., §§ 155, 156; *id.*, §§ 157–60, 165–6; see generally White v. Wilson, 6 Blackf., Ind., 448; Young v. Coleman, 43 Mo. 179; Hook, Adm'r, etc., v. Craighead, 32 Mo. 405; Leitensdorfer v. Delphy, 15 Mo. 160; Henderson v. Willis, 4 Scam., Ill., 13; 1 Edw. Ch. 477; Govenurer v. Titus, 1 Rol., Va., 287; Blessing v. Beatty, 1 Ind. 389; Watson v. Cox, 3 Sm. & M., Miss., 67; Simmons v. North, 36 Mo. 526; 26 Mo. 56; and see further 2 Johns. 558; 5 Johns. Ch. 224; *id.* 184; 10 Conn. 244; 1 Johns. Ch. 607; 1 Dev. Eq. 379; 1 Pet., U. S., 13; 3 Clark, Iowa, 557; 4 *id.* 314.) The second deed of trust cuts no particular figure in the case, except that, it being recorded and purporting on its face to be a

bona fide deed, it was enough to put Cason on inquiry before buying—enough to give him constructive notice of Young's claim.

II. If Young had any rights at all, he had them under his deed of trust in equity, and it required no sale under that deed to perfect those rights, except so far as to close up or complete them. Under the deed of trust, Young and others had a prior and superior equity in the land in controversy, and his purchase gave him no better rights, but only gave him power to assert them in a court of equity.

III. A purchaser with notice is treated by the courts just as his vendee; and Cason having both actual and constructive notice, stands exactly in the position Cordell himself would have occupied if his property had not been sold, and Cason will be held to be a trustee for Young. (Sto. Eq., § 395; Sugd. Vend., 1st Am ed., 470–1 and authorities cited; 4 Kent, 172; Wallace v. Wilson, 30 Mo. 335; 14 Mo. 170; 20 Mo. 133; Murray v. Ballou, 1 Johns. Ch. 566; 2 Johns. Ch. 158.)

BLISS, Judge, delivered the opinion of the court.

This cause has been once before this court, and is reported in 43 Mo. 179. On being remanded, an amended petition was filed, in which several new parties joined as plaintiffs; and Coleman, being a nominal defendant, was not named. We before found that the mistake in the first deed was sufficiently established, but it did not appear that the plaintiff had paid the debt, to secure which the deed was given, and therefore he had no equity as against other creditors. It now appears that the debt, amounting to about $1,600, has been paid by the plaintiff and his co-sureties; that the original trust deed was executed to Parsons for the benefit of all the sureties, and that the property was bid in by Young for his and their benefit. The mistake is more clearly established than before, and the new plaintiffs who have joined with Young are his co-sureties, who have paid the debt, and for whose use he has bid in the property.

The defendant interposes the statute of limitations against all the new plaintiffs; but it will be seen that they have always been

in court as represented by their trustee, Young. Had the former judgment, which was in favor of Young alone, not been reversed, the other plaintiffs, according to the present showing, could have compelled him to hold the land as trustee; the trust being a continuing one, the statute would not run against them, and they should certainly be placed in no worse position because they now come in to have their equities adjusted as between themselves, as well as to enforce their equity against defendant, which before had been prosecuted alone by their trustee.

The decree affirms the sale to Young, but gives the property to all the present plaintiffs, for whose use he bid it in, and sets aside the lien and sale to defendant. The latter claims that there should be a re-sale. That point is not without difficulty. If the original mistake had not been corrected by the grantor through a new deed, and the sale had not been made under the latter deed as well as the former, I should think it clear that the sale ought not to be affirmed. It would not do for a mortgagee or trustee to proceed to sell property not named or embraced in the mortgage, and afterward for the purchaser to obtain a confirmation of the sale by showing that it was intended to be embraced. It is not such an equity as should be subject to sale under a power to sell something else, but the right to sell the specific property should be first established. In the present case, however, there was a new trust deed correcting the old one. The later one conveyed the legal title to the true property. There would have been no necessity of coming into court had not a judgment lien intervened, and equity may not only enforce liens but remove them when they come in conflict with a superior equity. If there had been a sacrifice of the property in consequence of this cloud — if it were shown to have been worth greatly more than the amount for which the sureties became liable — there might be some show of reason in the request, but nothing of the kind appears.

Judgment affirmed. The other judges concur.

SAMUEL C. DAVIS *et al.*, Plaintiffs in Error, *v.* JAMES MEREDITH, HORACE WILCOX, GARNISHEE, Defendant in Error.

1. *Garnishment—Wages, payment of.*—A garnishee will not be chargeable for payment of monthly wages to his employee after garnishment, the payments having been made so as to keep the amount due the employee below the value of his services for the thirty days preceding the several payments. (See Wagn. Stat. 664, § 37.)

Error to Cole Circuit Court.

E. L. Edwards & Son, for plaintiff in error.

E. L. King & Bro., for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This was a garnishment upon execution. The garnishee's answer shows that he was indebted to the debtor in the execution in the sum of $96 at the date of the service of the garnishment, and that the indebtedness was for wages earned by the debtor within the month then next preceding; that at the time of filing the answer he was indebted in the sum of $80.50, for labor done during and within the month then next preceding; that from the time of the service of the garnishment to the filing of the answer the garnishee had owed and paid the execution debtor in the aggregate the sum of $16; and further, that the indebtedness had at no time exceeded one month's wages, the payments having been made so as to keep the amount due the execution debtor below the value of his services for the thirty days preceding the several payments. Upon this state of facts shown by the answer, the garnishee was discharged, and the plaintiff brings the cause here by writ of error.

Prior to 1866, wages due from a garnishee to a person in his employment were not subject to garnishment whenever earned or whatever the amount. (R. C. 1855, p. 247, § 27.) In 1866 the law was changed, limiting the wages exempt from garnishment to wages due for the "last thirty days' service." The object of this exemption is manifest. It was to enable the employee to

apply his current earnings to the support of himself and family—a very just and humane provision; and it should have a liberal construction, so as to carry into effect the purposes of the Legislature.

The plaintiffs acquired no lien upon the $96 in the garnishee's hands at the date of the garnishment, since it was due the execution debtor for services rendered within the preceding thirty days, and was, according to the answer, paid off before the thirty days had run. That, then, was out of the case, and the various parties stood in relation to each other as though nothing had been in arrear when the garnishment was served. That being out of the way, the garnishee was at liberty to continue the debtor in service, paying him his wages from time to time as they were earned, leaving nothing in arrear that was not earned within the prescribed thirty days. According to the answer, that was what the garnishee did, and that he was warranted in doing. He did not thereby subject himself to liability over again to his employee's creditors.

I think the judgment was right and should be affirmed. The garnishee will be allowed $35 for answering in this court. The other judges concur.

ADAMS EXPRESS COMPANY, Appellant, *v.* JOHN RENO, CLINTON RENO, INTERPLEADER, Respondent.

1. *Practice, civil—Pleadings—Garnishment—Continuance, affidavit for.*—An affidavit for continuance in the trial of an interplea joined under an attachment suit, which affidavit was entitled as in the cause of the plaintiffs against garnishees in the attachment, was properly refused.
2. *Contracts—Unlawful consideration—Money may be recovered back, when.*—Money paid out to be used in efforts to procure pardon for a criminal may be recovered where it appears the efforts were not made and the agreement was unexecuted. The rule that money paid for an unlawful consideration cannot be recovered back applies to executed and not to executory contracts.
3. *Agent, special—Power of to bind a principal.*—An agent instructed to pay over money on a certain contingency to a particular person, cannot bind his principal by payment to a different person before the contingency is carried out.

Appeal from Cole Circuit Court.

Lay & Belch, for appellant.

All the evidence of the agreement between Ballinger and Clinton Reno to obtain the pardon of John Reno, and tending to show that the money was sent to Jefferson City to be paid to Ballinger alone, was wholly inadmissible in support of the claim of the interpleader. The agreement itself, and the object and purpose of sending the money to this State, were against public policy and contrary to good morals, and a party basing his cause of action upon such a state of facts, and alleging his own turpitude, cannot be heard in a court of justice. (Chit. Cont. 657, 673; Adams, Adm'r of Rose, v. Barrett, 5 Ga. 404; Fales *et al.* v. Mayberry, 2 Gall., U. S., 560; Bartle v. Coleman, 4 Pet. 184; Dixon v. Olmstead, 9 Verm. 310; Randall v. Howard, 2 Black, 585; Clippenger v. Hepbaugh, 5 Watts & Serg. 315; Wooten *et al.* v. Miller, 7 Sm. & M. 380; Armstrong v. Toler, 11 Wheat. 258; Roby v. West, 4 N. H. 290; Ellsworth *et al.* v. Mitchell, 31 Me. 247; Dix v. Van Wyck, 2 Hill, 522; Rose *et al.* v. Truax, 21 Barb., N. Y., 361; Guenther v. Dewein, 11 Iowa, 133; White v. Hunter, 3 Foster, N. H., 128; Swan v. Scott, 11 Serg. & R. 155; Clugas v. Penaluna, 4 T. R. 251, 466; Warnell v. Reed, 5 T. R. 304; Kribben v. Haycraft, 26 Mo. 396; Hatzfield v. Gulden, 7 Watts, 152.)

H. B. Johnson, for respondent.

There is no doubt that the arrangement between Ballinger and Reno in regard to the pardon is, as a contract, void as against public policy. (Kribben v. Haycraft, 26 Mo. 396.) But where a person advances money on an unexecuted contract, though the contract be void as against public policy, he may recover it back at any time before the money is delivered or the contract fully executed. (Skinner v. Henderson, 10 Mo. 205; Humphreys v. Magee, 13 Mo. 435; Gowan v. Gowan, 30 Mo. 472; Mount v. Waite, 7 Johns. 434; Vischer v. Yates, 11 Johns. 23; Wheeler

v. Spencer, 15 Conn. 28; McAlister v. Hoffman, 16 Serg. & R. 147; Rucker v. Wynne, 2 Head, 617; House v. Kenney, 46 Me. 94; Shannon v. Banner, 10 Iowa, 210.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted by attachment, by the plaintiff, an incorporated company, against John Reno, a convict in the Missouri penitentiary, to recover damages for a robbery alleged to have been committed by him at Seymour, Indiana. John Reno appeared by attorney, and filed an answer denying all the material allegations in the petition. Over $4,000 in United States currency was attached in the hands of the Jefferson City Savings Association as his property. Clinton Reno appeared and filed his interplea, claiming the money attached as his property. To this interplea there was an answer filed, and upon the issue as thus made up the cause was tried. After hearing the evidence, the jury rendered their verdict, finding that the property belonged to the interpleader, and upon this verdict the court gave judgment in his behalf. From that finding and judgment the plaintiff appealed to this court.

The appellant complains in the first instance of the action of the court in refusing to grant a continuance. When the cause was called for trial an affidavit was submitted praying for a continuance on the ground of the absence of material witnesses, whose testimony could not be obtained or produced at the trial at that term. The affidavit was entitled "The Adams Express Co., plaintiff, against John Reno, Clinton Reno, D. A. Wilson, P. T. Miller and Philip E. Chappell, garnishees, defendants."

The court overruled the motion for a continuance, for the reason that it did not appear that the affidavit had any reference to the controversy pending between the appellant and the interpleader. The affidavit was distinctly entitled as in the cause of the appellant against John Reno and the garnishees in that action; and as the issue joined on the interplea constituted a wholly separate cause, there was nothing to show that the affidavit was made with any reference to this proceeding. Under

such circumstances we cannot say that the court erred or abused its discretion in refusing the continuance.

Upon the merits the facts seem to be these: John Reno was sentenced to the Missouri penitentiary for robbing the county treasury of Davies county. The County Court of Davies county authorized Ballinger, the sheriff of that county, to submit a proposition to Clinton Reno, that if he (Clinton) would pay the sum of $5,000 toward reimbursing the county of the amount robbed, then the judges of the County Court and Ballinger would use their influence with the governor to procure a pardon for John. In accordance with this proposition, Clinton Reno, who resided in Indiana, endeavored to raise the $5,000 for the purpose contemplated, but could only obtain the sum of $4,400. This amount he sent by his sister Laura to this State, thinking that Ballinger might be induced to take it and effect the pardon. He instructed Laura to bring the money back with her in case the pardon was not procured, and to pay it to no one but Ballinger. When she arrived at Jefferson City she did not see Ballinger, and nothing was done toward a pardon; and when she was about to return home she was persuaded by Wilson, the warden of the penitentiary, to leave the money with him, and that Ballinger might come and accept it. She informed him of Clinton's instructions as to bringing the money back, but was finally induced to leave it. Wilson gave her a receipt for it, and then deposited it in the bank for use of John Reno. When Laura returned home Clinton was greatly displeased with the disposition she had made of the money, and expressed his decided disapprobation of her course in disobeying his instructions. John Reno was never pardoned, nor does it appear that any efforts were made looking to that end. It is now insisted that, as the money was to be used for an illegal purpose, the law will not assist Clinton to recover it, or in anywise help him in regaining its possession.

No principle is better settled than that a contract in violation of law or against public policy cannot be enforced in the courts of the country. In all such cases the courts will not interfere, and the parties will be left where their conduct has placed them. An agreement to pay a certain sum for the exercise of influence

in procuring a pardon or the commutation of a sentence is utterly void as against public policy, and incapable of enforcement in the courts. (Kribben v. Haycraft, 26 Mo. 396.) But an examination of the cases will show that this rule applies to executed contracts and agreements. Where parties have been guilty of turpitude in entering into illegal agreements, or have performed acts which are stigmatized as against public policy, the courts of the country furnish them no redress. But if propositions have merely been made contemplating such purposes, but nothing has been done to finally accomplish or consummate them, they stand in a very different attitude. The moral stain has not attached, and the guilt has not been carried out. The doctrine applies solely to executed contracts, but I have never seen any case which would warrant its application to contracts which are executory.

Betting on horse-racing is illegal, and it has been held that where a person deposits money with a stakeholder, to be held to abide the result of a horse-race, he may institute a common-law action and recover the same at any time before the bet has been determined, and that the recovery may be without reference to any provision in the act concerning gaming. (Humphreys v. Magee, 13 Mo. 435.)

In the case of Skinner v. Henderson, 10 Mo. 205, the question was directly presented, and it was decided that an action would lie to recover back money paid under an illegal agreement, at any time before the agreement was executed. In the opinion the court used this language: "The rule in respect of money paid on illegal contracts appears, in general, to be that money so advanced may be recovered in an action for money had and received, while the contract remains executory, because a violation of the law is thereby prevented; but if the contract be executed, it cannot be recovered back. When both parties are *in pari delicto*, *melior est conditio defendentis*, not because he is favored in law, but because the plaintiff must draw his justice from pure sources. (Bul. N. P. 132; Douglas, 470.")

The same principle was adjudged in Gowan's Adm'r v. Gowan, 30 Mo. 472, it being there held that where a debtor

deposits personal property in the hands of another as bailee, with a view fraudulently to protect it from his creditors, such bailee cannot avail himself of such fraudulent intent to defeat an action brought against him by the debtor for the recovery of such property.

These citations from our court are abundantly sufficient to show the established doctrine in this State.

It is not pretended that there was any executed agreement in this case. In fact, it can hardly be said there was any agreement at all. A proposition was made by a party, but the record does not show that it was definitely accepted by the other. Five thousand dollars was the sum held out as the amount on which steps were to be taken looking to the release. Clinton was unable to raise that sum, and there is no evidence that he agreed to pay that or any other amount. He sent what money he had to see if anything could be done, but no arrangements were subsequently made, and it does not appear that the matter was ever entertained or talked of after the money was sent to this State. Clearly, there is nothing here to place him within the principle of the rule, or preclude his recovering the money.

It is further contended that Clinton parted with all interest in the money when it was deposited in the bank to the use of John, and that if he intended to retain the title he should have given notice of his dissent from the disposition that was made of it. But the parties who received the money were apprised of the special circumstances surrounding the deposit. The money was left with Wilson to be paid out in a particular event and manner to Ballinger when John was pardoned. It was placed in bank wholly for that purpose, though nominally for the use of John. But it was not the exclusive and absolute property of John, and was never intended to be so. Laura was acting as a special agent, appointed for a particular purpose, and she could not bind her principal by any act beyond her authority. (Tate v. Evans, 7 Mo. 419.) She had no authority to transfer the money to John, or to anybody else except Ballinger, and only to him upon the happening of a particular event. The law will not presume or imply a ratification on the part of Clinton of Laura's unauthor-

ized acts as to any party here contesting his right to the money. The view we have taken disposes of the instructions and renders it unnecessary to give them an especial consideration.

Upon an examination of the whole record we are decidedly of the opinion that the judgment is right and ought to be affirmed. The other judges concur.

WILLIAM AND MARGARET POUNDS, Respondents, *v.* N. H. DALE, Appellant.

1. *Wills — Descents and distribution — Heir not mentioned in will takes, when.* — In order to prevent an heir not provided for in a will from taking his distributive share, under section 9 of the statute concerning wills (Wagn. Stat. 1385), the will must show on its face that the testator remembered him. He need not be directly named in the will, but it must contain provisions or language that point directly to him. Thus it cannot be inferred that, because the testator provided for the payment of debts due two of his children, he intended to disinherit the rest.

Appeal from Third District Court.

This suit was brought by plaintiff by virtue of her rights under the general law of descents and distributions. Judgment in the lower court was for plaintiff, and was affirmed in the District Court.

N. H. Dale, in pro. pers., for appellant.

In Massachusetts and New Hampshire, where statutes similar to our own existed, the courts invariably held that if it appeared from the will, or from any part of it, or by just inference it was presumable, that a child not named in the will of his parent was not unknown to or forgotten by the testator, but was before the mind of the testator when the will was made, and the claims of that child were at all considered by the testator when disposing of his property, then an intestacy as to that child could not be declared. (Black v. Black, 3 Mo. 594; Guitar v. Gordon, 17 Mo. 408; Hockensmith v. Slusher, 26 Mo. 237; Wilder v. Goss,

14 Mass. 357; Church v. Crocker, 3 Mass. 17; Wilson v. Fosket, 6 Metc. 400; Tucker v. City of Boston, 18 Pick. 162; Merrill v. Sanborn, 2 N. H. 499; 1 Redf. Wills, 435, § 19; *id.* 432, §§ 16, 18; *id.* 426, note 7; *id.* 453–5, § 5.)

Early in the history of this State the Supreme Court of the State gave the same construction to our statute (see Black v. Black, 3 Mo. 594), and it has ever since been the uniform construction in every case where the facts were such that the rule would apply. (Hull v. Dowdall, 20 Mo. 359; Reed v. Ownby, 44 Mo. 204; Tucker v. Boston, *supra.*)

We think that the language of the will in question clearly shows that the plaintiff and all the other children were before the mind of Oliver Beach when he was disposing of his property, and that his intention that none of his children should have any of his property is very clearly expressed.

T. A. Sherwood, with *George W. Randolph*, for respondent.

The declaration of law given on behalf of plaintiffs was correct. (R. C. 1855, p. 1568, § 10; Bradley v. Bradley, 24 Mo. 311.) The decisions of our own State, on which appellant relies, do not apply here. Those of Massachusetts cited by him were made upon a different state of facts and under a statute differing widely from ours (Wilson v. Fosket, 6 Metc. 400; Bradley v. Bradley, *supra*), and the same may be said of the decisions of other States which he cited.

An unnamed or unprovided-for child can only be cut off from his share by "an equal proportion of the testator's estate bestowed on him in the testator's lifetime by way of advancement." (R. C. 1855, p. 1568, § 11.)

Bliss, Judge, delivered the opinion of the court.

Margaret Pounds is the daughter of Oliver Brock, deceased, and claims that, as to her, he died intestate, from the fact that she was not mentioned in his will. She and her husband therefore bring ejectment to recover certain real estate of which said Brock died seized, and which was purchased by defendant of his devisee. The language of the will is as follows:

"After paying my funeral expenses and expenses of my sickness, I wish one hundred and forty dollars paid to my son William, it being borrowed money; also I wish one hundred dollars paid to my son John, it being borrowed money. After all my just debts are paid, I give and bequeath to my wife Jane Brock all my property of all kinds, real, personal and mixed, to have and to keep the same for her sole benefit, not to be controlled by anybody. In short, I give her the title in fee simple to everything I may be seized of."

The statute now, as when this will was made, provides that "the ancestor shall be deemed to have died intestate as to such child or children not named or provided for in the will." (Gen. Stat. 1865, ch. 131, § 1; Wagn. Stat. 1365.) It has frequently been considered by this court, and in the language of Judge Richardson in Hockensmith v. Slusher, 26 Mo. 237, "it may now be considered as settled that the object of it is to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten." The subject was reviewed by us in McCourtney *et al.* v. Mathes, 47 Mo. 533, and the above doctrine adhered to.

In construing the will under consideration, the only question to be considered is whether there is anything in the will that rebuts the presumption that Mrs. Pounds was forgotten, which presumption arises from the fact that she was "not named or provided for in the will." It is clear that the two sons, William and John, were not forgotten, for they were named, though not provided for. But I find nothing in the will to warrant us in saying affirmatively that Mrs. P. was in the mind of the testator. He had nine children, and defendant urges that it is unreasonable to suppose that he forgot the seven while naming the two. I certainly would conjecture that all were in his mind, and that he meant to disinherit them. But it is a mere guess. The will must show upon its face that he remembered them; and though they be not directly named, there must be provisions or language that point directly to

them. To hold, as claimed, that a reference to the two sons as creditors is also a reference to the plaintiff, would make the statute of no effect. Had the testator spoken of his children in the aggregate, specifying none, we must infer that they were all in his mind (McCourtney v. Mathes, *supra*); or if he had made a bequest to a son-in-law, it would be inferred that it was on his daughter's account (Hockensmith v. Slusher, *supra*); but the inference that, because he provided for the payment of debts due two of his sons, he intended to disinherit the rest, is too remote. The intention, in the absence of the statute, might be inferred from the devise to the widow, for that disposes of all the property. But the statute creates a presumption that they were forgotten unless named or provided for, or in some way referred to, and we find no such naming or reference.

The construction of a similar statute in Merrill v. Sanborn, 2 N. H. 499, completely nullifies it. A devise was made to two of seven grandchildren, and the court says that because of this devise, though no mention was made of the others, they could not have been forgotten. The family were not forgotten; but if the fact that no allusion, directly or indirectly, was made to the other members of the family, is to be treated as presumptive evidence that they were not forgotten, I cannot see how they can be said to have been remembered.

The judgment of the Circuit Court should be affirmed. The other judges concur.

JEFFERSON CITY SAVINGS ASSOCIATION, Defendant in Error, *v.* A. W. MORRISON, Plaintiff in Error.

1. *Interest — Money received by party who improperly applies it to his own use.*—When money is received by a party who applies it to his own use, or otherwise improperly detains it, he should pay the interest upon the money so used or detained.
2. *Practice, civil — Pleading — Demurrer waived by answering over.*—Defendant, by answering over after demurrer overruled, practically abandons the demurrer.
3. *Agency — Principal, by adopting acts of agent, makes them his own.*—A principal, by ratifying and confirming the acts of his agent, adopts them and makes them his own as from the beginning.

Error to Cole Circuit Court.

Ewing & Smith, for defendant in error.

A. M. Lay and *Geo. T. White*, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

The defendant executed to the plaintiff's assignor an obligation as follows:

"Received of sheriff of Camden county, by hand of G. M. Swink, four hundred dollars in cash.....$400
"Draft to T. E. Tutt & Co..... 135
$535

"Five hundred and thirty-five dollars *to be placed to his credit in the settlement of the revenue of his county*, 3d May, 1861.
(Signed) A. W. MORRISON, Treas."

The plaintiffs, as assignees, sue upon this obligation, and the main question arising upon the merits respects the defendant's liability for interest. He held possession of the money from May 3, 1861, to February, 1866, a period of about five years, without causing it to be placed to the credit of the party according to the terms of the receipt, or otherwise accounting for it. He nevertheless denies his liability for interest.

The rule in relation to the allowance of interest, in the absence of an express or implied contract to pay it, is not the same in this country as in England. "The courts of the United States," says Sedgwick, "have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or an implied promise to sustain the claim." (Sedgw. Dam. 438.)

Where money is received by a party who applies it to his own use, or otherwise improperly detains it, it is but just that he should pay interest upon the money so used or detained, and the courts of this country hold him to that liability. If, therefore, the defendant in this cause applied the funds intrusted to him to his own use, or otherwise improperly detained them, he should be held liable for the interest.

On this subject the jury were instructed as follows: "Among other facts to be found by the jury in this case is, whose duty it was, under the agreement, to make the settlement with the auditor for the revenue. If they believe from the evidence that Cummins, who was the sheriff of Camden county, from whom the money was received, was to make the settlement before Morrison was to pay over said money, then Morrison is not liable for interest on said money until Cummins made such settlement, or until a demand was made of Morrison for the same; but if they believe from the evidence that Morrison was to make such settlement, or was to apply said money whenever he received the same to settle up or close up Cummins' account with the auditor, then Morrison is liable for interest on said money from the time he should have so placed the same to the credit of Cummins."

I fail to perceive that the defendant has any just ground of objection to this instruction. It was sufficiently favorable to him. The fair construction of the receipt upon its face is that Morrison should place the money to Cummins' credit in some reasonable time, without waiting for any further action on the part of Cummins. Morrison held the money for nearly five years, as we have seen, and there is no pretense that he kept it locked up and out of use awaiting a call from Cummins.

The petition was demurred to, and the questions raised by the demurrer have been argued by the defendant's counsel. But the demurrer was overruled and the defendant answered upon the merits, thereby abandoning the demurrer. The demurrer is practically out of the case. (Pickering v. Miss. Valley Tel. Co., 47 Mo. 457.)

But it is objected that the demand sued on was not legally assigned to the plaintiffs prior to the commencement of the suit, and objection is taken to the evidence offered in proof of the assignment. Ewing & Smith indorsed and delivered the receipt to the plaintiffs, acting in the name and behalf of Cummins. This was done without the knowledge or authority of Cummins. After the suit was commenced, Cummins, on being informed of the whole matter, ratified and confirmed the acts of the attorneys, Ewing & Smith. He thereby adopted the acts of the attorneys,

and made them his as from the beginning. (1 Pars. Cont. 49.) At the instance of the defendant the jury were instructed to find for the defendant unless they found that the contract was assigned to the plaintiffs for the purpose of collection. The jury found for the plaintiffs, and must have found that the obligation sued on was transferred for the purpose indicated in the instruction. The plaintiffs sue as the trustees of an express trust. (Gen. Stat. 1865, p. 651, § 3.)

There is no evidence to show that the transfer was made for any sinister object. The case is wholly unlike Capital City Bank v. Knox, 47 Mo. 333, where there was a plea to the jurisdiction, alleging that the transfer in that case was made for a fraudulent purpose. Here the answer is upon the merits, and raises different issues.

This disposes of the material questions in the case. I do not deem it necessary to review the instructions in detail which were asked by the defendant and refused by the court. The case turns on two points, namely: whether the plaintiffs were the proper parties to sue on the demand; and, second, whether the defendant was liable for interest. These have been sufficiently considered.

With the concurrence of the other judges, the judgment will be affirmed.

S. S. Lengle, Defendant in Error, *v.* G. W. Smith, Plaintiff in Error.

1. *Partnership, what constitutes — Action founded on, nature of suit in.* — A. and B. entered into a contract for the purchase and sale of hogs and cattle. A. was to contribute his services in collecting the stock. B. was to furnish the capital. They were to divide the profits. No special contract was made as to the losses. *Held*, that a community of profits made them jointly liable for the losses; that they were partners, and that suit by A. for his proportion of the profits should have been an application to court for a settlement of partnership accounts, analogous to a late proceeding in chancery.
2. *Practice, civil — Appeal — Affidavit should be filed, when.* — When the affidavit and bond for an appeal were not filed during the term at which judgment was rendered, the appeal should be dismissed. (Gen. Stat. 1865, ch. 172, § 11; Wagn. Stat. 1059, § 11.)

Error to First District Court.

G. W. Miller, for defendant in error.

Wright & Snoddy, for plaintiff in error.

BLISS, Judge, delivered the opinion of the court.

The petition states that the plaintiff and defendant entered into a contract for the purchase and sale of hogs and cattle; that the plaintiff was to give his personal services to their purchase; that defendant was to advance the purchase money, receive them when purchased, and ship them to market for sale; and "that, when the cattle and hogs were so sold, the net profits arising therefrom should be equally divided between plaintiff and defendant, share and share alike." The petition further sets out the amount of the purchases and sales, charges the net profits to have been $4,200, half of which belonged to the plaintiff, and asks judgment for damages for withholding the amount from him. The answer denied all the allegations of the petition, and set up sundry counter-claims which were denied by the reply. The case was submitted to a jury like an ordinary action at law, and the plaintiff recovered judgment for some $800. The defendant, upon appeal, attacks the judgment, principally because the petition shows that the parties to the suit were partners, and hence the plaintiff mistook his remedy; while the plaintiff claims that there was no partnership, and also objects to the regularity of the appeal.

The plaintiff and defendant were partners. The one gave his services in buying and collecting the cattle and hogs; the other gave the use of the necessary capital; and they were to divide the profits. This community in the profits made them liable for the losses, there being no special contract in regard to them. Thus were they partners both in the profits and losses of the adventure. (Meyers v. Field, 37 Mo. 434; Whitehill v. Shickle, 43 Mo. 537.) The petition should have been an application to the court for a settlement of the partnership accounts, analogous to a late proceeding in chancery. But both parties, during the pending

of the case in the Circuit Court, treated the action as one at law; and the motion for a new trial and in arrest showed no other view of the case. Whether this failure by the defendant to take advantage of the plaintiff's mistake in regard to his remedy will not estop him from now urging it we will not consider, for the reason that defendant has failed to bring his case properly before us. The record proper contains no allowance of an appeal, and the affidavit and bond were not filed until some months after the adjournment of the court. The statute provides (Gen. Stat. 1865, ch. 172, § 11) that the appeal shall be made and the affidavit filed during the term at which the judgment was rendered; and for not having complied with the statute the appeal should have been dismissed.

At the last term of this court a motion was made to dismiss for this reason, but at the same time the appellant suggested diminution and asked for a more perfect record, and the motion was overruled. The new record does not help him; and the judgment of the District Court, affirming that of the trial court, is affirmed. The other judges concur.

R. G. Boggess, Plaintiff in Error, *v.* Isham Cox, Defendant in Error.

1. *Practice, civil — Judgment for costs — Appeal — Nonsuit.*—A judgment for costs is not a final judgment, and will not support an appeal or writ of error. And the rule holds, although the judgment was rendered on a nonsuit.

Where a nonsuit is taken, in order to justify an appeal or writ of error the judgment should be formally set out, "that it is by the court therefore considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of plaintiff his costs," etc.

Error to First District Court.

Boggess & Sloan, and *Lay & Belch*, for plaintiff in error.

H. B. Johnson and *H. H. Harding*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The District Court dismissed the writ of error in this case on the ground that there was no final judgment rendered in the Circuit Court.

Upon the trial the plaintiffs offered a deed in evidence, and it being excluded by the court, they took a nonsuit, with leave to move to set the same aside; and upon a motion to set the nonsuit aside being overruled they excepted, wherefore the court gave judgment against them for costs, and this was the only judgment rendered in this cause.

It is well settled that a judgment for costs only is not a final judgment, and will not support an appeal or writ of error. Nor is there any difference between a final judgment rendered on a nonsuit and in any other case. Where a nonsuit is taken, in order to justify an appeal or writ of error the judgment should be formally set out, "that it is by the court therefore considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of the plaintiff his costs," etc.

The action of the District Court in dismissing the writ must therefore be affirmed. The other judges concur.

H. R. SWEET, ADMINISTRATOR OF R. R. JONES, DECEASED, Plaintiff in Error, *v.* C. L. JEFFRIES *et al.*, Defendants in Error.

1. *Sureties — Note — Payment of by principal — Subrogation.* — The sureties of a sheriff who were compelled to pay over to certain heirs the amount due them by him on the sale of the lands in partition, may be joined with the sheriff's administrator as plaintiffs in suit on the note given for the purchase of the land. Having under compulsion paid the beneficiaries of the note the sum due them, the sureties were entitled to succeed to their rights, and payment of the amount due should be made to the sureties.
2. *Practice, civil — Pleadings — Payments made after pleadings made up — Testimony touching, improper.* — The admission of testimony showing payments made on a debt sued for after the pleadings are made up is clearly erroneous. After-occurrences are not in issue and not open to investigation.

Error to First District Court.

Lay & Belch, for plaintiff in error.

The court did not err in permitting Breckenridge, Whitson and Maupin to become parties. They had an interest in the result of the suit. Their petition supplemental shows that they asked and obtained permission to be made parties, and certainly their petition shows interest. This practice is allowed by the statute. (Wagn. Stat. 1034, §§ 3, 4; 42 Mo. 101; 2 Head, 289; 29 Mo. 429; 27 Mo. 227; 3 Conn. 537; 3 Barb. Ch. 625.) It is allowable, by long practice founded on policy in preventing a multiplicity of suits, and in order that complete justice may be done, and is a great convenience to the courts. (Barb. Parties, 326; 4 Pet. 190; 3 Cow. 537; 19 Ill. 320; 10 Iowa, 201.)

T. W. B. Crews and *H. Flanagan*, for defendants in error.

The District Court committed no error in reversing the judgment of the Circuit Court. The evidence of the plaintiffs showed that they had no interest in the event of the suit at the time the amended petition was filed. The alleged payments made by Maupin were, according to plaintiff's testimony, made four months after the amended petition was filed. The petition was filed in April, and the payments made in the month of August following.

CURRIER, Judge, delivered the opinion of the court.

This action is founded upon a note drawn by the defendant and made payable to Richard R. Jones as sheriff of Franklin county, for the benefit of certain heirs of one Young, the names of such heirs being unknown at the time the note was executed. Jones was sheriff of Franklin county, and, as such, sold certain premises in a proceeding for partition, the defendant Jeffries becoming the purchaser. Jeffries and the other defendant gave the note in suit for the purchase money, payable to Jones as sheriff, as above stated. Jones having deceased, this suit is prosecuted by his administrator.

In the progress of the case an amended petition was filed, bringing upon the record additional parties plaintiff — namely, Breckenridge, Whitson and Maupin — who were sureties on Jones' official bond as sheriff, and who claim to have paid off the amount due the Young heirs under the partition sale. They aver in the amended petition that they were sued as sureties upon Jones' bond, and compelled to pay, and that they did pay, the amount due said heirs under said sale, answering to the amount due upon the note in suit, judgment having first been rendered against them for that sum in the suit upon the bond, as the plaintiffs aver. It is then alleged that, by reason of the premises, Breckenridge, Whitson and Maupin are entitled to the benefits of the note in suit; and judgment is asked thereon in their favor accordingly, as also for general relief.

Young's heirs were the beneficiaries of the note, Jones being a trustee for their benefit. If his sureties under compulsion have paid the beneficiaries the amount due them, why ought not the sureties to succeed to the position and rights of the beneficiaries in respect to the note? Jones' representative makes no objection, and it can make no difference to the makers of the note what particular party gets the benefit of it—whether the original payee, the original beneficiaries, or the parties who have been compelled to pay these beneficiaries the amount due them. It is just and equitable, under the circumstances stated, that the sureties should have the benefit of the note, and that payment of the balance due should be made to them. (See 1 Sto. Eq., § 499 *et seq.*) To that end it was proper to admit them as parties to the record, for the purpose of being subrogated to the rights originally vested in Young's heirs, in case it should appear that the claim of these heirs had been satisfied by the sureties, as alleged in the amended petition. This allegation of the petition, among others, was replied to and denied.

At the trial there was no attempt to show any payment on the part of the sureties prior to the filing of their petition. The court, however, notwithstanding the defendant's objections, admitted evidence, such as it was, tending to show that the alleged payment was made some months after the amended petition was

filed, and only a few days prior to the trial of the cause. This action on the part of the court, as it seems to me, was clearly erroneous; the parties were bound to stand upon the facts existing at the time the issues were made up, and as alleged in the pleadings. After-occurrences were not in issue and consequently not open to investigation. This view of the subject is not in conflict with Morrow v. Bright, 20 Mo. 298. That case turned upon a different point.

I think the judgment of the District Court reversing that of Circuit Court should be affirmed, and that the order of the District Court dismissing the sureties from the case should be set aside and held for naught, and the cause remanded for further proceedings in the Circuit Court. With the concurrence of the other judges it will be so ordered. On proper application and upon suitable terms, the Circuit Court should grant leave to Breckenridge and the other co-sureties to amend their petition, so that the facts may be alleged as they are now claimed to exist. The other judges concur.

STATE, TO USE OF PACIFIC RAILROAD, Plaintiff in Error, *v.* G. H. DULLE *et al.*, Defendants in Error.

1. *Revenue — Taxation, repeal of temporary rate of — Power of Legislature, etc.* — As a general proposition, there can be no doubt of the power of the Legislature to repeal a temporary rate of taxation and impose another and higher rate, or additional taxes, by virtue of the State sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power, upon a consideration deemed to be a part of the value of the grant or the charter.
2. *Revenue — Pacific Railroad liable for county taxes — Construction of statute.* — Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of State taxes, nevertheless, under the constitution (art. II, § 16) and the general statute (2 Wagn. Stat. 1159-61, §§ 1-9), the company was liable for its county taxes.
3. *Revenue — County collector a ministerial officer — Where assessor has jurisdiction, collector protected in making levy, etc.* — The office of county col-

lector is a ministerial one, and where an action of trespass is brought against a county collector for levying upon and seizing property for unpaid taxes, if it appear that the assessor has jurisdiction over the property — *i. e.* that it is liable to taxation in any form — then the collector will be protected notwithstanding irregularities in the mode of assessment.

Error to Cole Circuit Court.

Ewing & Smith, with *J. N. Litton*, for plaintiff in error.

I. The county tax should be levied against the shareholders of the corporation. (St. Louis Building & Savings Ass'n v. Lightner, 42 Mo. 421; Anderson v. Blattau *et al.*, 43 Mo. 42; First Nat. Bank of Hannibal v. Meredith, 44 Mo. 500; 2 Wall., U. S., 200.)

II. The petition shows on its face that the taxes levied by the county were not against the shares or shareholders, and hence the assessment on its face is void.

III. The collector, Dulle, was bound to know that this tax was unauthorized and illegal; that the assessor and County Court had no jurisdiction or power conferred by law to assess the roadbed, depot, and other effects of this corporation, instead of the shares therein. The assessment was illegal. It was apparent on the face of the tax book, and hence he collected the tax at his peril. He was not only liable, but his sureties on his bond for enforcing the collection of this illegal tax were also liable. (State, to use of Hann. & St. Jo. R.R., v. Shacklett *et al.*, 37 Mo. 280; State v. Moore, 19 Mo. 372; 6 Barr, Penn., 460; 1 Conn. 40; 11 Conn. 95; 5 Wend. 276; 8 Pick. 133.)

IV. Even if the assessment is held not to be void on its face, the notice to the collector and payment of the amount of illegal tax under protest, as alleged in the petition, is sufficient to make him a trespasser if he attempts to collect such tax by seizure and sale of the effects of the corporation. (Elliot v. Swartwout, 10 Pet. 150; State, to use of Hann. & St. Jo. R.R., v. Shacklett, *supra.*)

V. The company was not subject to tax from the county. After a certain time and event the corporation was, by the terms of the grant from and contract with the State, to be taxed in a

manner specifically pointed out therein. (Sess. Acts 1853, §§ 11, 12.) This grant and contract were in lieu of the exemption provided for in the act of 1851 (Sess. Acts 1851–2, p. 271, § 6), and authorized no county tax whatever.

E. S. King & Bro., with *E. L. Edwards & Sons*, for defendants in error.

Under the general revenue law of the State "all property," with certain exceptions, is subject to taxation. (Wagn. Stat. 1159, § 1.) That of the Pacific Railroad is not an exception. (Wagn. Stat. 1159, §§ 2–9.) County Courts are authorized to levy taxes for county purposes upon all property taxable for State purposes. (Wagn. Stat. 1196, § 76.)

There is no law, special or general, exempting the property of the Pacific Railroad from the payment of taxes. (R.R. Laws of Mo. 67.) And there being no special way pointed out by any special law for making the levy and collection of the county taxes, it necessarily follows that the tax must be assessed and collected under the general revenue law of the State.

The property of the road, and not the capital stock, ought to be subject to taxation.

WAGNER, Judge, delivered the opinion of the court.

This was an action against the defendant Dulle, who was collector of revenue in Cole county, and the sureties on his official bond, for levying upon and seizing certain property of the plaintiff for unpaid county taxes and coercing the payment thereof. The property consisted of certain lots belonging to the plaintiff, in the county of Cole, and were duly assessed by the assessor, and the lists returned and placed in the hands of the defendant for collection. No irregularities are perceived on the face of the proceedings. The petition is based on the fact that the assessment for county purposes was wholly illegal, and furnished no justification for the action of the collector.

A demurrer was sustained to the petition, and the only question is whether the defendant can be held liable for his act in enforcing collection.

The plaintiff claims exemption from county assessment and taxation by virtue of its charter and the amendments thereto. By the sixth section of the amendments to the plaintiff's charter, approved March 1, 1851, it is provided that "the capital stock, together with all machines, wagons, cars, engines and carriages belonging to the company, together with all their works and other property, and all profits which shall arise from the same, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the period of five years from the passage of this act." (Sess. Acts 1851, p. 271, § 6.)

By an act entitled "An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," it was enacted that "the said Pacific Railroad and the said Southwestern Branch Railroad shall be exempt from taxation respectively, until the same shall be completed, opened and in operation, and shall declare a dividend; when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the State on other real and personal property of like value."

The section further provides for ascertaining the value of the property, and makes it the duty of the president of the company, on the first day of February of each year, after the road is completed, opened and put in operation, and pays a dividend, to furnish the auditor a statement of the amount under oath, and from the statement it is made the duty of the auditor to charge the company with the taxes appearing to be due the State; and it is further provided "that if the said company shall fail for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then said company shall no longer be exempt from the payment of said tax," etc. (Sess. Acts 1853, p. 13, § 12.)

It will be thus seen that section 6 of the act of 1851 exempts all the property of the corporation for the period of five years from the passage thereof. Section 12 of the act of 1852 extends the exemption until the road shall be completed, opened and put in operation, and declare a dividend, provided the dividend shall be declared within two years after the completion of the same; and if no such dividend is declared, then the exemption is to cease. The section makes provision for the ascertainment and payment of State taxes, but does not include county taxes.

Under a very similar provision in the amendatory charter of the Hannibal & St. Joseph Railroad, this court decided that the road-bed, machinery and depots of the Hannibal & St. Joseph Railroad, and the other property used by said company in operating its road, were to be considered as part of and represented by the capital stock of said company, and not liable to taxation under that provision of the general revenue law (R. C. 1855, p. 1322) subjecting to taxation "all property owned by incorporated companies over and above their capital stock." (Hann. & St. Jo. R.R. Co. v. Shacklett, 30 Mo. 550.)

But it is to be observed that the original charter of the Hannibal & St. Joseph Railroad exempted the stock of the road from the payment of all taxes, both State and county.

The present constitution of this State, adopted in 1865, declares that no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties or to municipal corporations within this State. (Const. Mo., art. II, § 16.)

The revenue law declares that taxes shall be levied on all property, real and personal, and that all property personal by the laws of this State, situate in a county other than the one in which the owner resides, shall be assessed in such last-mentioned county. (2 Wagn. Stat. 1159–61, §§ 1–9.)

The act of 1868 gives express power to the several County Courts to levy such sums as may be annually necessary to defray

the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes, with certain exceptions. (2 Wagn. Stat. 1196, § 76.)

Under this power the county of Cole acted in making the assessment and collection. From the view that we have taken of this case, it will be unnecessary to decide whether the Legislature, acting under the provisions of the constitution, intended by the general revenue law to repeal the alleged exemption from county taxes.

As a general proposition, there can be no doubt of the power of the Legislature to repeal a temporary rate of taxation and impose another and higher rate, or additional taxes, by virtue of the State's sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power, upon a consideration deemed to be a part of the value of the grant or the charter. (Gordon v. Tax Appeal Court, 3 How. 133; Providence Bank v. Billings, 4 Pet. 574; City of St. Joseph v. Hann. & St. Jo. R.R. Co., 39 Mo. 476; Lionberger v. Rowse, 43 Mo. 67.)

By the charter, provision was simply made for the payment of State taxes, but it does not follow that any limit was placed upon the sovereign power to subject the corporation or its property to taxation within the limits of the county. Although the property should probably have been assessed to the shareholders, yet if it was liable to taxation at all, the irregularity in the mode of proceeding would not make the collector liable. (St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 463.)

Whether the assessment was erroneous or not is a question entitled to little consideration here, for this is not a proceeding to correct an erroneous assessment, but it is an action for trespass against a public officer for executing an entirely void process. Where the statute has pointed out a remedy by which erroneous assessments can be corrected and rectified, mere ministerial officers, whose duty it is to execute the process placed in their hands, ought not, except in special cases, to be proceeded against.

In The Mutual Life Ins. Co. v. Charles, *supra*, this court said: "Tax collectors have always been held to the same measure of

liability as sheriffs and constables. The action of the assessor and that of the board of appeals or County Court in the matter, is judicial in its character; and as with sheriffs, etc., the collector need only inquire whether the assessor has jurisdiction over the property—*i. e.* whether it is liable to taxation in any form—and he need not trouble himself about the regularity of his proceeding. If the tax list shows jurisdiction he is protected."

A sheriff and his sureties will be held responsible on the official bond, where the officer commits a trespass in seizing goods exempt from execution, or sells the property of a person other than the debtor in the execution. (State v. Moore, 19 Mo. 369.)

In the case of The State, to use, etc., v. Shacklett *et al.*, 37 Mo. 280, we held the collector and his sureties answerable, but in that case it appeared that direct proceedings had been instituted to test the legality of the assessment and levy, and that they were decided to be void. (30 Mo. 550.) After this decision Shacklett failed to pay over the money, and was in fact a defaulter, and we therefore decided that he and his sureties were liable on his official bond for failure to pay after the judgment of this court. In that case also the writ clearly disclosed a want of jurisdiction.

In the case of Glasgow v. Rowse, 43 Mo. 479, it was held that if a law under which an assessment was made was not unconstitutional, even though the assessor committed an irregularity in the manner of making the assessment, the collector would not be liable in an action of trespass for executing a warrant for the collection of the tax founded on such assessment.

In Melburn v. Gillman it was held that a ministerial officer was not liable in trespass for executing a writ issued under the judgment of a court having jurisdiction of the person and subject-matter, although the judgment was erroneous. (11 Mo. 64.) So in Turner v. Franklin, 29 Mo. 285, the action was brought to recover damages for a wrongful levy upon and sale of a horse. The defendant, who was constable, justified the alleged trespass, setting up that he made the levy and sale under and by virtue of a warrant and sale bill issued by a board of school trustees. The court held that he was protected, and declared that "the officer

has no right to look into the record of the suit or examine the validity of the judgment. His duty is simple obedience to the mandate of the writ; and if the writ on its face shows the jurisdiction of the court from which it issued, the officer is protected in executing it." (See also Mut. Ins. Co. v. Charles, 47 Mo. 462.)

We think the statute sufficiently conferred jurisdiction; whether rightfully or wrongfully it is not necessary now to decide, as nothing but the liability of the defendant is involved in this contest.

Where the statute made all property liable to taxation, and empowered the several County Courts to levy such sums as might be annually necessary to defray the expenses of their respective counties, by a tax upon all property made taxable by law for State purposes, it conferred the jurisdiction, and was a sufficient warrant for the collector to justify him in obeying the process and mandate placed in his hands.

Acting in good faith, and upon what was deemed good authority on its face, he ought not to be compelled to litigate the legality of the law. This case differs widely from those where the officer has been held answerable in trespass for acting without any authority.

Therefore the judgment should be affirmed. The other judges concur.

CHARLES PHOL, GUARDIAN, ETC., Defendant in Error, *v.* H. BUNCE, ADMINISTRATOR, ETC., Plaintiff in Error.

1. *Practice, civil — Bill of exceptions, judgment must be set out in.* — When the bill of exceptions fails to set out the judgment so as to show whether it was absolute or conditional, interlocutory or final, the appeal will be dismissed.

Error to First District Court.

C. M. Gordon, for defendant in error.

Draffin & Muir, for plaintiff in error.

CURRIER, Judge, delivered the opinion of the court.

The record in this cause shows no final judgment. I find a memorandum in the bill of exceptions thus: "The court then rendered judgment in favor of the plaintiff;" but the judgment itself, if there was one, is not set out, nor is there anything to show whether the supposed judgment was absolute or conditional, interlocutory or final. The defendant's counsel refers to the supposed judgment as being conditional, but the record shows nothing in relation to the matter.

Writ dismissed. The other judges concur.